(1)

No. 95-7452-CFH Title: Kenneth Lynce, Petitioner
v.
Hamilton Mathis, Superintendent, Tomoka Correctional Institution, et al.

Docketed:
January 17, 1996 Court: United States Court of Appeals for the Eleventh Circuit

See also:
95-6825

Entry	Date	Proceedings and Orders
	Jan 10 1996	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due February 16, 1996)
	Feb 29 1996	DISTRIBUTED. March 15, 1996
	Mar 6 1996	Response requested. (Due April 8, 1996)
	Apr 8 1996	Brief of respondents Hamilton Mathis, Superintendent, et al. in opposition filed.
	Apr 25 1996	REDISTRIBUTED. May 10, 1996
	May 13 1996	Petition GRANTED. limited to Question 1 presented by the petition.
		SET FOR ARGUMENT November 4, 1996.
		**********
	Jun 5 1996	Joint appendix filed.
	Jun 11 1996	Order extending time to file brief of petitioner on the merits until July 12, 1996.
	Jul 12 1996	Brief amicus curiae of Florida Public Defender Association, Inc. filed.
	Jul 12 1996	Brief of petitioner Kenneth Lynce filed.
	Jul 12 1996	LODGING consisting of 12 spiral bound books containing four documents submitted by counsel for petitioner
	Jul 12 1996	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Aug 23 1996	Record filed.
	Aug 29 1996	Brief of respondent Robert A. Butterworth filed.
	Aug 30 1996	Brief amici curiae of Nevada, et al. filed.
	Sep 3 1996	Brief of respondent Hamilton Mathis, Superintendent filed.
	Sep 10 1996	CIRCULATED.
	Sep 30 1996	Reply brief of petitioner Kenneth Lynce filed.
	Nov 4 1996	ARGUED.

1pp

95-7452 (2)

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

- - - - - - - - - - -

KENNETH LYNCE,

Petitioner,

v.

HAMILTON MATHIS
ROBERT BUTTERWORTH

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOEL T. REMLAND
Counsel for Petitioner LYNCE
Assistant Federal Public Defender
Florida Bar ID No. 169291
80 North Hughey Avenue, Suite 417
Orlando, Florida 32801-2229
Telephone: (407) 648-6338

47 pp

Questions Presented for Review

Petitioner, Kenneth Lynce, contends the United States Court of Appeals, erred in denying his request for a certificate of probable cause.[1] He maintains his petition makes a substantial showing of the denial of a federal right, to wit: A violation of the *Ex Post Facto* Clause by the state's cancellation of petitioner's previously granted early release credits and retroactive application of offense-based exclusions from eligibility.

Further, the petitioner contends issues related to this question are debatable and adequate for further proceedings. This Court currently has other similar cases pending, involving the same issues as presented here on appeal from the United States Court of Appeals for the Eleventh Circuit: *Hock v. Singletary*; *Magnotti v. Singletary*, filed with this Court respectively in August and November 1995.

Thus, a certificate of probable cause was justified and should have been issued to answer the following questions:

1. Does the *Ex Post Facto* Clause forbid a state to cancel a prisoner's previously granted early-release credits and nondiscretionary release date through the retroactive application of offense-based exclusions from eligibility?

2. Does a state legislature deprive a prisoner of liberty without due process of law by destroying lawfully granted early-release credits and a lawfully established early-release date without providing adjudicatory procedures and in the absence of substantive justification other than the nature of the prisoner's antecedent offense.

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[1]Kenneth Lynce v. Hamilton Mathis, Superintendent, Tomoke Correctional Institution, and Robert Butterworth, Attorney General, State of Florida

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Opinion Below

On October 12, 1995, the United States Court of Appeals for the Eleventh Circuit, issued an order without opinion, denying Petitioner's Application for a Certificate of Probable Cause. Mr. Lynce is serving a 22 year sentence in the Florida Department of Corrections.

Grounds for Jurisdiction

Grounds for invoking jurisdiction of this Court:

i.. The judgment of the United States Court of Appeals for the Eleventh Circuit of which review is sought was entered on October 12, 1995, denying Petitioner's Application for Certificate of Probable Cause.

ii. This petition is timely filed within the prescribed ninety days from the judgment rendered, pursuant to United States Supreme Court Rule 13.1, and this Court's jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved herein follows:

U.S. CONST. art I, § 10, cl. 1 provides in pertinent part that:

"No State shall ... pass any ... ex post facto Law ... "

U.S. CONST. amend XIV, § 1 provides in pertinent part that:

"[N]or shall any State deprive any person of life, liberty or property, without due process of law ... "

The following Florida Statutes are reproduced in the Appendix:

§ 921.001, Fla. Stat. (Supp. 1986)

§ 921.001(9)(b), Fla. Stat. (1993)

§ 921.001(10)(b), Fla. Stat. (1987)

§ 921.001(11)(d), Fla. Stat. (Supp. 1988)

§ 944.276, Fla. Stat. (1987)

§ 944.277, Fla. Stat. (Supp. 1988)

§ 944.277, Fla. Stat. (Supp. 1992)

§ 944.598, Fla. Stat. (Supp. 1986)

STATEMENT OF THE CASE

The State of Florida convicted Petitioner Lynce of attempted first degree murder and other offenses on April 14, 1986. He was sentenced to a term of 22 years imprisonment. He became eligible for "provisional gain time" or early-release credits under § 944.277, Fla. Stat. (Supp. 1988), which authorized his release on October 1, 1992. After being released, the law was changed by amendment, see § 944.277, Fla. Stat. (Supp. 1992), and a subsequent interpretation by the Florida Attorney General's office authorized a retroactive application and cancellation of all petitioner's previously earned 1860 days of early release credits.

Thus, Mr. Lynce was arrested in June 8, 1993, and sent back to prison, due to this retroactive cancellation of his early release credits. His release date was changed from October 1, 1992, to May 19, 1998. Petitioner has claimed his release date is November 5, 1998. His sentence of imprisonment was increased by the revocation of all provisional gain time previously authorized under §944.277 and § 921.001, Fla. Stat. (Supp. 1988).

This petition was filed on August 18, 1994. My Lynce challenged the application of the 1992 law to him as *ex post facto* and as a denial of due process. The District Court approved the United States Magistrate Judge's Report and Recommendation of March 14, 1995, and dismissed the petition on May 10, 1995. This Report primarily relied on the case of *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), for denial of this petition. The *Hock* case is now pending before this Court, as is the case of *Magnotti v. Singletary*.

Petitioner Lynce filed for a certificate of probable cause in the District Court which was

denied on June 16, 1995. An appeal to the Eleventh Circuit proved futile and on October 12, 1995, the application for a certificate for probable cause was denied. This petition was filed to seek further relief.

Basis for Federal Jurisdiction

Original jurisdiction of the district court was invoked under 28 U.S.C. § 2254. Review of that court's judgment was sought by appeal to the United States Court of appeals for the Eleventh Circuit, pursuant to 28 U.S.C. § 1291. This petition follows.

REASONS FOR GRANTING THE WRIT

Petitioner requests this Court grant a certificate of probable cause and allow an appeal on the merits. The denial of the petition was based upon the case of *Hock v. Singletary, Supra*. The analysis of this case decided by the Eleventh Circuit conflicts substantially with the *ex post facto* analysis mandated by this Court's subsequent decision in *California Department of Corrections v. Morales*, 115 S.Ct. 1597 (1995). The Eleventh Circuit did not have the benefit of the *Morales* opinion when it rejected Mr. Hock's *ex post facto* claim.

Nowhere do the precedents of this Court recognize a "procedural" or "administrative convenience" exception to the *Ex Post Facto* Clause. In its broadly worded and confusing creation of such an exception, the opinion in *Hock* conflicts directly with *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991), and *Ex parte Rutledge*, 741 S.W.2d 460 (Tex. Crim. App. 1987)(*en banc*). It also conflicts with the reasoning and holdings of this Court in *Morales, Miller v. Florida*, 482 U.S. 423 (1987); *Weaver v. Graham*, 450 U.S. 24 (1981), and *Lindsey v.*

Washington, 301 U.S. 397 (1937).

This Court held in *Weaver v. Graham*, 450 U.S. 24 (1981), and other cases that retroactive reductions in substantial opportunities for early release violate the *Ex Post Facto* Clause. In numerous cases culminating in the *Morales* case, the Court has firmly established that a retroactive increase in the effective term of confinement is *ex post facto*. The judgment below conflicts with *Weaver*, and it strongly conflicts in principle with *Morales; Collins v. Youngblood*, 497 U.S. 37 (1990), and earlier opinions of this Court.

The judgment of the lower court also conflicts directly with *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991), and *Ex parte Rutledge*. Unlike the Eleventh Circuit, which upheld the cancellation of Petitioner's credits and nondiscretionary release date, the Tenth Circuit and Texas courts recognize that retroactive ineligibility for early-release credits designed in part to control the prison population have the prohibited effect of increasing punishment.

The *ex post facto* question is of great constitutional and practical importance. Numerous states employ, and the durations of thousands of criminal sentences are affected by, mechanisms surrounding the sentence that shorten the duration of incarceration. The Eleventh Circuit has erred on this important question by exempting early-release laws, essentially on grounds of administrative convenience, from the constraints of the *Ex Post Facto* Clause.

I. THE JUDGMENT OF THE ELEVENTH CIRCUIT CONFLICTS DIRECTLY WITH *WEAVER v. GRAHAM* AND CONFLICTS IN PRINCIPLE WITH *CALIFORNIA DEPARTMENT OF CORRECTIONS v. MORALES*.

The judgment of the court below relying on *Hock*, is in substantial conflict with each of this Court's opinions applying the *Ex Post Facto* Clause to retroactive increases in punishment.

It conflicts directly with *Weaver v. Graham* and *Greenfield v. Scafati*, 277 F. Supp. (D. Mass. 1967)(three-judge court), *summarily aff'd*, 390 U.S. 713 (1968). On fundamental *ex post facto* principles it conflicts with *California Department of Corrections v. Morales*, 115 S.Ct. 1597 (1995), *Miller v. Florida*, 482 U.S. 423 (1987), *Lindsey v. Washington*, 301 U.S. 397 (1937), and other authority. Given the clarity and consistency of the Court's precedents, summary reversal pursuant to Rule 16.1 would be appropriate.

The conflict with *Weaver v. Graham* and *Greenfield v. Scafati* is direct. In *Weaver*, this Court struck down as *ex post facto* a retroactive Florida law that potentially added over two years to the actual duration of the prisoner's confinement. *Weaver*, 450 U.S. at 27 n. 6. The 1979 law held unconstitutional in *Weaver* was reduced the amount of basic gain-time the Secretary was required to deduct from the prisoner's sentence. *Id.* at 26. Basic gain-time was a determinant of the actual duration of the prisoner's confinement. *Id.* at 31-32. The Court held that the new law "constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment." *Id.* at 35-36. The cancellation of Mr. Lynce's 1860 days of early-release credits and his October 1, 1992, effected an increase in the actual duration of his incarceration that was both greater and more certain than the increase held unconstitutional in *Weaver*.

There can be no clearer *ex post facto* violation under *Weaver* than the State's increase -- after releasing petitioner on October 1, 1992 -- Mr. Lynce's incarceration by over five years and solely by reason of his 1986 conviction for attempted first degree murder. Where *Weaver* and *Greenfield* were concerned with the potential effects of generally applicable amendments, this case presents an actual, fully quantified increase in the duration of confinement based explicitly

on the nature of the prisoner's antecedent offense. The judgment below directly conflicts with *Weaver* and *Greenfield*.

In addition to the direct conflict with *Weaver*, the lower court's judgment repudiated the constitutional principles established by each of this Court's opinions analyzing the effects of retroactive laws on punishment. The lower court's rejection of Mr. Lynce's claim conflicts with the following *ex post facto* principles:

1. A law that is asserted procedural in name or form is *ex post facto* if it retroactively increases punishment.

According to the court below the retroactive cancellation by law of a known quantity of early-release credits and an established release date, solely by reason of the prisoner's antecedent offense, is "procedural" and, therefore, not *ex post facto*. (See my Report as App.). This rational conflicts with this Court's consistent understanding that the *Ex Post Facto* Clause prohibits the retroactive application of procedural laws that effectively increase the actual duration of confinement. "[B]y simply labelling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause. Subtle *ex post facto* violations are no more permissible than overt ones....[t]he constitutional prohibition is addressed to laws, whatever their form, which...increase the punishment." *Collins v. Youngblood*, 497 U.S. 37, 46 (1990)(citations and internal quotation omitted).

Just last term the Court, by fully analyzing the potential effects of a procedural law, made it clear that the *ex post facto* prohibition applies with full force to any law, "procedural" or otherwise, that affects punishment. *See California Department of Corrections v. Morales*, 115 S.Ct. 1597 (1995)(assessing in detail the potential effects of a law governing the timing of parole

suitability hearings without employing the term "procedural"). The mere characterization of a law as "procedural" is, standing alone, not dispositive of an *ex post facto* claim. *Miller v. Florida*, 482 U.S. 423, 233 (1987); *Weaver v. Graham*, 450 U.S. 24, 36 n.21 (1981). The judgment below conflicts with this well-established principle.

2. The ex post facto analysis must focus on the concrete effects of the challenged law.

The entire thrust of this Court's recent opinion in *California Department of Corrections v. Morales*, 115 S.Ct. 1597 (1995), is that the *Ex Post Facto* Clause requires an analysis of the effects of the new law on the actual duration of imprisonment.. In the course of its detailed analysis of the California law that altered the frequency of parole suitability hearings, the Court repeatedly emphasized that it could not discern the effects prohibited by the *Ex Post Facto* Clause: a substantial risk of increasing the actual duration of confinement. *Id.* at 1603, n.4, 1604, 1605. *Morales* confirms that the constitutional standard applicable to Mr. Lynce's claim is whether the 1992 Florida law effectively increases his confinement. *Id.* at 1603 n.4. *See also Weaver*, 450 U.S. at 32 n.17.

The lower court refuses to apply that standard. The 1992 Florida law obviously extended -- and was intended to extend -- Mr. Lynce's actual period of confinement by 1860 days; it extended his operative release date pursuant to Section 921.001 from October 1, 1992 to tentatively May 19, 1998 or November 5, 1998. That increase in the actual period of confinement is precisely the effect that the *Ex Post Facto* Clause, as interpreted by *Morales* and its forbears, prohibits. By ignoring that effective increase, the lower court's judgment conflicts with the most fundamental premise of *Morales, Miller v. Florida*, 482 U.S. 423 (1987), *Weaver*

v. Graham, 450 U.S. 24 (1981), and *Lindsey v. Washington*, 301 U.S. 397 (1937).

3. The prohibition against *ex post facto* laws applies to adjustments to procedures surrounding the sentence

The lower court ignores the obvious increase in Mr. Lynce's confinement by asserting that "provisional gain-time is in no sense tied to any aspect of the original sentence." The court's evasive rationale substantially conflicts with basic *ex post facto* principles.

Each of this Court's relevant opinions emphasized that the *ex post facto* prohibition extends to early-release and other laws that effectively increase punishment, even if those laws are not sentencing laws, narrowly conceived. *See Miller*, 482 U.S. at 432-33; *Weaver*, 450 U.S. at 31-33; *Lindsey*, 301 U.S. at 401-02. *Morales* expressly confirms this basic principle by performing an effects-oriented analysis of a parole law. *Morales*, 115 S.Ct. at 1603 n.4, 1602-05. The lower court flouts it.

Although the lower court's assertion that early-release is not "tied to the original sentence" is contrary to law and fact, this Court's longstanding interpretations of the *Ex Post Facto* Clause render it constitutionally irrelevant. *Ex post facto* constraints clearly apply to the alteration of a fixed release date, the date on which the sentence of imprisonment effectively ends.

Incarceration is punishment, and longer incarceration is greater punishment. By canceling Mr. Lynce's credits and release date, § 944.277(1)(i), Florida Statutes (Supp. 1992), increased the actual duration of Mr. Lynce's confinement. The judgment of the lower court upholding the 1992 law conflicts with *Weaver* and the principles firmly established by *Morales* and numerous other cases. For this reason alone the Court should grant certiorari to reverse judgment.

II. THE OPINION OF THE COURT OF APPEALS CONFLICTS DIRECTLY WITH JUDGMENTS OF THE TENTH CIRCUIT AND STATE COURTS.

Petitioner Lynce claims that the *Ex Post Facto* Clause constrains the State to determine his eligibility for overcrowding-related release credits and to calculate his actual release date in accordance with the law in effect at the time of his offense or its substantial equivalent. In *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991), the court upheld an identical claim made by an Oklahoma prisoner. Similar claims were upheld in *Ex parte Rutledge*, 741 S.W.2d 460 (Tex.Crim.App. 1987)(*en banc*). *See Story v. Collins*, 920 F.2d 1247, 1251-52, 1252 n.1 (5th Cir. 1991)(discussing Texas cases). The judgment of the Eleventh Circuit conflicts with these cases.

In *Arnold* the Tenth Circuit held that 1989 amendments to the Oklahoma Prison Overcrowding Emergency Powers Act, which excluded any prisoner denied parole from eligibility for overcrowding-related "emergency time credits," were *ex post facto* as applied to *Arnold*. *Arnold*, 951 F.2d at 281, 283. The court, expressly disagreeing with the reasoning of an Oklahoma appellate court, concluded there is no constitutionally significant distinction between eligibility for good-time credits and eligibility for overcrowding-related credits; both shorten the duration of confinement. *Id.* at 282-83. The only discernible purpose and effect of the 1989 exclusions from eligibility were to increase the duration of confinement of the retroactively excluded offenders. *Id.* at 283. For the Tenth Circuit, therefore, it is the effect of making punishment for antecedent crimes more onerous than condemns the new law as *ex post facto*. The Texas court's interpretation of the *Ex Post Facto* Clause is substantially similar. *Rutledge*, S.W. 2d at 462.

The lowers court's analysis in this case, in contrast, strains to overlook the predictable and intended effects of the 1992 law on the actual duration of incarceration. The court below first

avoids any analysis of the effects of the law by labeling it "procedural." (*Citing Dugger v. Rodrick*, 584 So.2d 2, (Fla. 1991), *cert. denied*, 502 U.S. 1037 (1992)). Then, ignoring the undisputed facts that provisional release credits shorten the duration of confinement and advance a mandatory release date, the court states wrongly that the credits are not tied to the original sentence. Thus, in the Eleventh Circuit even the obvious effects of the new law on the mandatory release date and the actual duration of imprisonment are deemed to be constitutionally irrelevant.

All of this Court's *ex post facto* holdings, from *Lindsey v. Washington*, 301 U.S. 397 (1937), through *Morales*, direct the lower court to focus their analyses of sentencing-related laws on the potential effects of the new law on the actual duration of confinement. *Arnold* and *Rutledge* are faithful to the command; the judgment below is not. The rationale and result of the lower court's disposition directly conflict with *Arnold* and *Rutledge*, introduce confusion and instability into *ex post facto* doctrine, and materially harm numerous people.

The Court should grant *certiorari* to resolve the conflicts and reaffirm the applicability of *ex post facto* constraints to retroactive adjustments to mechanisms surrounding the sentencing process that increase the actual duration of confinement.

CONCLUSION

The petition for a writ of certiorari should be granted and a certificate of probable cause issued. Furthermore, relief on the merits is also requested by an order restoring petitioners early-release credits, revoked by the *ex post facto* violation herein.

JOEL T. REMLAND
Assistant Federal Public Defender
FL Bar ID # 169291
80 North Hughey Avenue, Suite 417
Orlando, Florida 32801-2229
(407) 648-6338
Counsel for Petitioner KENNETH LYNCE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

OCT 12 1995

NO. 95-2773

KENNETH LYNCE,

Petitioner-Appellant,

versus

HAMILTON MATHIS, Superintendent;
ROBERT A. BUTTERWORTH, Attorney General of the State of Florida;
HARRY K. SINGLETARY, JR., as Secretary of the Florida Department of Corrections,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

ORDER:

Appellant's application for a certificate of probable cause is DENIED.

UNITED STATES CIRCUIT JUDGE

CIV 91
(Rev 5/85)

PD

JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT: MIDDLE DISTRICT OF FLORIDA/ORLANDO DIVISION
CASE TITLE: KENNETH LYNCE V. HAMILTON MATHIS, et al	DOCKET NUMBER: 94-891-Civ-Orl-18
	NAME OF JUDGE: Judge G. Kendall Sharp

FILED
95 MAY 10 PM 12:10

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came before the Court with the judge named above presiding. and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Petitioner, Kenneth Lynce take nothing and the action be dismissed.

COPIES MAILED TO:

Joel T. Remland, Esquire
Susan A. Maher, Esquire

DOCKET ENTRY ROLL # 88
DOCUMENT # 488

CLERK	DATE
DAVID L. EDWARDS	May 10, 1995
(BY) DEPUTY CLERK	

FILED

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CLERK U.S. DIST COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KENNETH LYNCE,

Petitioners,

-vs-

Case No. 94-891-Civ-Orl-18

HAMILTON MATHIS, et al.,

Respondents.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

I. Status

Petitioner initiated this action for habeas corpus relief pursuant to 28 U.S.C. § 2254 on August 18, 1994 (Doc. No. 1). Upon consideration of the petition, the Court ordered Respondents to show cause why the relief sought in the petition should not be granted. Respondents filed a reply to the petition in accordance with the Court's instructions and Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (Doc. No. 22, filed March 6, 1995). Petitioner alleged only one claim for relief, that the State's retroactive application of its provisional release credits statute was an *ex post facto* law in violation of Article I, Section 10 of the United States Constitution.

II. Factual Background

Petitioner was convicted of attempted first-degree murder, armed burglary, and possession of a firearm in the commission of a felony on April 14, 1986. He was sentenced to a term of twenty two years imprisonment. Under the State's provisional release credit statute in force at

AO 72A
(Rev. 8/82)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KENNETH LYNCE,

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AO 72A
(Rev. 8/82)

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that time, he was eligible to accumulate credits to shorten his period of incarceration. Fla.Stat. ch. 944.277 (1989). The provisional credits were only to be awarded during periods when the prisoner population of the correctional system approached full capacity, and then only to inmates not convicted of certain enumerated offenses or serving a mandatory minimum sentence. Fla.Stat. ch. 944.277(1) (1989).

From the time of his sentencing to January 1991, Petitioner accumulated 1860 days of provisional release credits. During the 1992 session, the Florida Legislature amended the provisional release credit statute to exclude the award of credits to prisoners convicted of attempted murder. Fla.Stat. ch. 944.277(1) (1992 Supp.). Petitioner's provisional release date, hastened by the 1860 days of credit previously awarded, was therefore set at October 1, 1992. On that date, Petitioner was released from custody.

On December 29, 1992, Robert Butterworth, Attorney General of the State of Florida, issued an opinion interpreting the 1992 amendment of Fla.Stat. ch. 944.277. 92 Op. Att'y Gen. 96 (1992). He found that the provisional release credit statute was adopted as a permissive administrative means for relieving prison overcrowding. He also found that a footnote which had restricted previous amendments to Fla.Stat. ch. 944.277 to prospective effect was not included in the 1992 amendment. He therefore concluded that the 1992 amendment was intended to have retroactive effect, which he believed precluded the award of any provisional release credits to a prisoner convicted of murder.

Harry Singletary, Jr., Secretary of the Florida Department of Corrections, solicited a further opinion from the Attorney General on the interpretation of the amended provisional release statute. On December 31, 1992, the Attorney General clarified his previous opinion and

suggested that provisional release credits awarded before the 1992 amendment of Fla.Stat. ch. 944.277 to inmates convicted of murder should be withdrawn. He also found that, while no court decision compelled the Department of Corrections to recommit previously released prisoners, the department could do so at its own discretion.

Petitioner's provisional release credits were cancelled on January 4, 1993. The Department of Corrections submitted an Affidavit for Retaking Prisoner to the Ninth Judicial Circuit Court on May 3, 1993. On May 17, 1993, the Court issued an Order for Execution of Sentence Imposed and Retaking of Prisoner. Petitioner was returned to incarceration on June 8, 1993. His prior release date of October 1, 1992 was cancelled and his tentative release date was delayed until May 19, 1998.

III. Findings of Fact and Conclusions of Law

Petitioner contends that the cancellation of his accumulated provisional release credits pursuant to the 1992 amendment of Fla.Stat. ch. 944.277, which caused a significant delay in his tentative release date, is an *ex post facto* law in violation of Article I, Section 10 of the United States Constitution. Respondents contend that provisional release credits were an administrative tool to reduce prison overcrowding, not a mitigation of punishment. They also contend that the statute was merely procedural and therefore did not affect the magnitude of punishment imposed for conviction of an offense.

Article I, Section 10 of the United States Constitution states, "No State shall . . . pass any . . . ex post facto Law." U.S. Const. art. I, § 10, cl. 1. The Framers intended the *ex post facto* clause to be a safeguard for the public which would force criminal legislation to provide fair warning of its effects and permit reliance until explicitly changed. *Weaver v. Graham*, 450 U.S.

24, 28 (1981). The prohibition extends to any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. at 28 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1867)). Two elements are required for a criminal or penal law to be considered *ex post facto*: it must apply to events occurring before its enactment and it must disadvantage the offender it affects. *Id.* at 29; *Lindsay v. Washington*, 301 U.S. 397, 401 (1937). However, legislation which satisfied both requirements would not violate the *ex post facto* prohibition if the change it effected were merely procedural and did "not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Hopt v. Utah*, 110 U.S. 574, 590 (1884); *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

In *Weaver v. Graham*, 450 U.S. 24, 67 L.Ed.2d 17 (1981), the Supreme Court held unconstitutional the application of the amended Florida good time gain-time statute to inmates convicted before the effective date of the statute. The amendment decreased the number of days of gain-time that an inmate could earn per month for good behavior. *See* Fla.Stat. ch. 944.27(1) (1975), Fla.Stat. ch. 944.275(1) (1979). Although previously awarded gain-time was not cancelled or reduced, the new gain-time statute was applied to all inmates in the prison system, including those convicted before the enactment of the amendment. The State of Florida advanced three arguments suggesting that the law was not *ex post facto*: first, it did not impair vested rights; second, on its face, it applied only prospectively; and third, it did not worsen the conditions of incarceration.

The Court rejected the first argument out of hand; vested rights have never been a requirement for protection under the *ex post facto* clause, only under the contracts clause and the

due process clause. *Weaver*, 450 U.S. at 29. As to the second argument, even though the amendment was prospective in form, it was retrospective in effect. "The critical question is whether the law changes the legal consequences of acts completed before its effective date." *Id.* at 31. Prisoners incarcerated for previous conduct would have greater consequences attached to those prior acts, and the law was therefore retrospective. The application to earlier offenders was repugnant to the original meaning of the *ex post facto* clause because an inmate who considered gain-time before entering a guilty plea would have calculated and relied upon a shorter sentence under the then existing statute. *Id.* at 32. Finally, the Court addressed whether the amendment placed the prisoner in a worse position than the prior law. Because a prisoner had less opportunity to shorten his sentence, he would have been materially harmed by the change. *Id.* at 33. The Court did not consider Florida's argument that the alteration was merely procedural, for it substantively changed the gain-time available, not merely the method by which it was assigned.

The Eleventh Circuit turned to the issue of gain-time after Florida again altered the formula for its award. In *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989), the Court held unconstitutional a decrease of the opportunity to earn incentive gain-time. The amended statute provided for increased good behavior gain-time but decreased the amount of incentive gain-time that could be earned by diligent labor. *See* Fla.Stat. 944.275 (1982), Fla.Stat. ch. 944.275 (1983). The net effect for an inmate who labored diligently was a decrease in available gain-time. The State of Florida made three closely related arguments as to why the statute was not *ex post facto*: first, the granting of incentive gain-time was discretionary, while the granting of good behavior gain-time was automatic; second, the granting

of incentive gain-time was discretionary because the duties which allowed an inmate to earn it were a matter of legislative grace; and third, the increase in good behavior gain-time offset the decrease in incentive gain-time.

The Court found that although an inmate had no *right* to gain-time, either good behavior or incentive, the *ex post facto* clause has never required a vested right to be impaired to violate the clause. *Raske*, 876 F.2d at 1499 n.5. In fact, the Court found that both incentive gain-time and good behavior gain-time, which was held subject to the prohibition in *Weaver*, were discretionary. *Id.* Not only did the State have discretion in determining whether good behavior or incentive gain-time would be awarded, it used similar criteria in making the decision. There was therefore no distinction between the two insofar as the *ex post facto* clause was concerned, so the reasoning of *Weaver* applied to incentive gain-time. *Id.* While the work an inmate performed to earn incentive gain-time may have been a matter of legislative grace, if the State afforded the inmate the opportunity to work, it was bound to reward the prisoner for his services with at least as much gain-time as he would have earned at the time of his offense. *Id.* at 1500. Finally, although an inmate might not earn the maximum award of incentive gain-time (and was eligible to earn more good behavior gain-time under the new statute), the denial of the opportunity to do so made the punishment for the prisoner's offense more onerous than when the offense was committed.

In *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), the Eleventh Circuit addressed the 1989 amendment of Florida's control release statute, Fla.Stat. ch. 947.146 (1989). The goal of the control release program, like that of provisional release credits, was to ease the overcrowding of the state correctional system. The 1989 amendment of the control release statute transferred

responsibility for control of the prison population from the Florida Department of Corrections to the Florida Parole Commission and altered prisoner eligibility. Prior to the amendment, prisoners convicted of murder were eligible for control release; after the amendment, they were not.

The Court, reasoning in summary fashion, found that "any disadvantage suffered by the petitioner does not affect punishment and therefore does not violate the Ex Post Facto Clause." *Hock*, 41 F.3d at 1472. In contrast with the alterations in the good behavior gain-time statutes which had been held unconstitutional in *Weaver* and *Raske*, it found that the control release statute was procedural, not substantive. *Id.* The Court agreed with the Florida Supreme Court's interpretation of the *ex post facto* clause, in which it had earlier held that Fla.Stat. ch. 944.277 "was procedural in nature, [and] not directed toward the traditional purposes of punishment." *Dugger v. Roderick*, 584 So.2d 2 (Fla. 1991), *cert. denied sub nom. Roderick v. Singletary*, __U.S.__, 116 L.Ed.2d 790 (1992). It therefore held that retroactive application of the amendment did not run afoul of the *ex post facto* clause.

The Eleventh Circuit then stated that the amendment to the control release statute, unlike changes in good behavior and incentive gain-time statutes, did not deny inmates the ability to reduce their terms of confinement. *Hock*, 41 F.3d at 1472. The control release statute permitted release based upon prison system overcrowding, not diligent inmate labor and good behavior. The former was independent of an prisoner's labors, the latter the fruit of it. The Court also held that good behavior gain time could be predicted and accounted for in entering into a plea bargain and sentencing but control release could not. *Id.* at 1473.

Although the Eleventh Circuit's opinion is sparsely reasoned, it resolves the issues at question. Provisional release credits were merely an earlier alternative to control release as a

means to relieve prison overcrowding. In fact, *Roderick*, the Florida case upon which the Eleventh Circuit relies heavily, dealt with provisional release credits, not control release. Therefore, in all likelihood, were the Eleventh Circuit to have faced the issue of provisional release credits under Fla.Stat. ch. 944.277 instead of the control release statute, it would have held the 1992 amendment not to violate the *ex post facto* clause. Accordingly, the undersigned respectfully recommends that the Petition for Writ of Habeas Corpus filed herein be **DENIED** and that the case be **DISMISSED** with prejudice.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Orlando, Florida on March 14, 1995.

David A Baker

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Honorable G. Kendall Sharp
Joel T. Remland
Susan A. Maher

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Section 921.001
Florida Statutes (Supp. 1986)
[1986 Fla. Laws ch. 86-273;
1983 Fla. Laws ch. 83-87, § 2]

921.001 Sentencing Commission.—

(1) The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. The Legislature, in the exercise of its authority to establish sentencing criteria and to provide for the imposition of criminal penalties, has determined that it is in the best interest of the state to develop, implement, and revise a uniform sentencing policy in cooperation with the Supreme Court. In furtherance of this cooperative effort, there is created a Sentencing Commission which shall be responsible for the initial development of a statewide system of sentencing guidelines. After final development of a sentencing guidelines system by the Supreme Court, the commission shall evaluate these guidelines periodically and recommend such changes on a continuing basis as are necessary to ensure certainty of punishment as well as fairness to offenders and to citizens of the state.

(2)(a) The commission shall be composed of 15 members, consisting of: two members of the Senate to be appointed by the President of the Senate; two members of the House of Representatives to be appointed by the Speaker of the House of Representatives; the Chief Justice of the Supreme Court or a member of the Supreme Court designated by the Chief Justice; three circuit court judges and one county court judge to be appointed by the Chief Justice of the Supreme Court; and the Attorney General or his

designee. The following members shall be appointed by the Governor: one state attorney recommended by the Florida Prosecuting Attorneys Association; one public defender recommended by the Public Defenders Association; one private attorney recommended by the President of the Florida Bar; and two persons of the Governor's choice. The Chief Justice or the member of the Supreme Court designated by the Chief Justice shall serve as chairman of the commission.

(b) The members of the commission appointed by the Governor, the President of the Senate, and the Speaker of the House of Representatives shall serve 2-year terms, except that the initial appointees shall serve until January 1, 1984. The members appointed by the Chief Justice of the Supreme Court shall serve at his pleasure.

(c) Membership on the commission shall not disqualify a member form holding any other public office or from being employed by a public entity. The Legislature finds and declares that the commission serves a state, county, and municipal purpose and that service on the commission is consistent with a member's principal service in a public office or in public employment.

(d) Members of the commission shall serve without compensation but shall be entitled to be reimbursed for per diem and travel expenses as provided for in s. 112.061.

(e) The office of the State Courts Administrator shall act as staff for the commission and provide all necessary data collection, analysis, and research and support services.

(3) Following the initial development of statewide sentencing guidelines by the court, the commission shall meet annually or at the call of the chairman to review sentencing practices and recommend modifications to the guidelines. In establishing or modifying the sentencing guidelines, the

commission shall take into consideration current sentencing and release practices and correctional resources, including the capacities of local and state correctional facilities, in addition to other relevant factors. For this purpose, the commission is authorized to collect and evaluate data on sentencing practices in the state from each of the judicial circuits.

(4)(a) Upon recommendation of a plan by the commission, the Supreme Court shall develop by September 1, 1983, statewide sentencing guidelines to provide trial court judges with factors to consider and utilize in determining the presumptively appropriate sentences in criminal cases. The statewide sentencing guidelines shall be implemented by October 1, 1983, unless the Legislature affirmatively delays the implementation of such guidelines prior to October 1, 1983. The guidelines shall be applied to all felonies, except capital felonies, committed on or after October 1, 1983, and to all felonies, except capital felonies and life felonies, committed prior to October 1, 1983, for which sentencing occurs after such date when the defendant affirmatively selects to be sentenced pursuant to the provisions of this act.

(b) The commission shall, no later than October 1 of each year, make a recommendation to the members of the Supreme Court, the President of the Senate, and the Speaker of the House of Representatives on the need for changes in the guidelines. Upon receipt of such recommendation, the Supreme Court may within 60 days revise the statewide sentencing guidelines to conform them with all or part of the commission recommendation. However, such revision shall become effective only upon the subsequent adoption by the Legislature of legislation implementing the guidelines as then revised.

(5) Sentences imposed by trial court judges must be in all cases within any relevant minimum and maximum sentence limitations provided by statute and must conform to

all other statutory provisions. The failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to chapter 924. The extent of departure from a guideline sentence shall not be subject to appellate review.

(6) The sentencing guidelines shall provide that any sentences imposed outside the range recommended by the guidelines be explained in writing by the trial court judge.

(7) The Sentencing Commission and the office of the State Courts Administrator shall conduct ongoing research on the impact of sentencing guidelines adopted by the commission on sentencing practices, the use of imprisonment and alternatives to imprisonment, and plea bargaining. The commission, with the aid of the office of the State Courts Administrator, the department and the Parole and Probation Commission, shall estimate the impact of any proposed sentencing guidelines on future rates of incarceration and levels of prison population. Such estimates shall be based in part on historical data of sentencing practices which have been accumulated by the office of the State Courts Administrator and on department records reflecting average time served for offenses covered by the proposed guidelines. Projections of impact shall be reviewed by the commission and made available to other appropriate agencies of state government, including the Legislature, by December 15 of each year.

(8) A person convicted of crimes committed on or after October 1, 1983, or any other person sentenced pursuant to sentencing guidelines adopted under this section shall be released from incarceration only:

(a) Upon expiration of his sentence;

(b) Upon expiration of his sentence as reduced by accumulated gain-time; or

(c) As directed by an executive order granting

clemency.

The provisions of chapter 947 shall not be applied to such person.

History. - ss. 1,2,3, ch. 82-145; s. 2, ch. 83-87; s. 176, ch. 83-216; s. 2, ch. 84-328; s. 1, ch. 86-273.

Section 921.001(9)
Florida Statutes (1993)
[1993 Fla. Laws ch. 93-406, § 5]

[1]**921.001 Sentencing Commission and sentencing guidelines generally.—**

(9)(a) The Sentencing Commission and the office of the State Courts Administrator shall conduct ongoing research on the impact of the sentencing guidelines, the use of imprisonment and alternatives to imprisonment, and plea bargaining. The commission, with the aid of the office of the State Courts Administrator, the Department of Corrections, and the Parole Commission, shall estimate the impact of any proposed changes to the sentencing guidelines on future rates of incarceration and levels of prison population, based in part on historical data of sentencing practices which have been accumulated by the office of the State Courts Administrator and on Department of Corrections records reflecting average time served for offenses covered by the proposed changes to the guidelines. The commission shall review the projections of impact and shall make them available to other appropriate agencies of state government, including the Legislature, by October 1 of each year.

(b) On or after January 1, 1994, any legislation which:

1. Creates a felony offense;

2. Enhances a misdemeanor offense to a felony offense;

3. Moves a felony offense from a lesser offense severity level to a higher offense severity level in the offense severity ranking chart in s. 921.0012; or

4. Reclassifies an existing felony offense to a greater felony classification

must provide that such a change result in a net zero sum impact in the overall prison population, as determined by the Criminal Justice Estimating Conference, unless the legislation contains a funding source sufficient in its base or rate to accommodate such change or a provision which specifically abrogates the application of this paragraph.

History.—ss. 1,2,3, ch. 82-145; s. 2, ch. 83-87; s. 176, ch. 83-216; s. 2, ch. 84-328; s. 1, ch. 86-273; s. 2, ch. 87-110; s. 5, ch. 88-96; s. 8, ch. 88-122; s. 2, ch. 88-131; s. 3, ch. 89-526; s. 6, ch. 90-211; s. 69, ch. 91-110; s. 1, ch. 91-239; s. 1, ch. 92-135; s. 5, ch. 93-406.

[1]**Note.**—Section 5, Ch. 93-406, provides for applicability to sentencing for offenses committed on or after January 1, 1994.

Section 921.001(10)
Florida Statutes (1987)
[1987 Fla. Laws ch. 87-110, § 2]

(10) A person convicted of crimes committed on or after October 1, 1983, or any other person sentenced pursuant to sentencing guidelines adopted under this section shall be released from incarceration only:

(a) Upon expiration of his sentence;

(b) Upon expiration of his sentence as reduced by accumulated gain-time; or

(c) As directed by an executive order granting clemency.

The provisions of chapter 947 shall not be applied to such person.

History. - ss. 1, 2, 3, ch. 82-145; s. 2, ch. 83-87; s. 176, ch. 83-216; s. 2, ch. 84-328; s. 1, ch. 86-273; s. 2, ch. 87-110.

Section 921.001(11)
Florida Statutes (Supp. 1988)
[1988 Fla. Laws ch. 88-122, § 8]

(11) A person who is convicted of a crime committed on or after October 1, 1988, shall be released from incarceration only:

(a) Upon expiration of his sentence;

(b) Upon expiration of his sentence as reduced by accumulated gain-time;

(c) As directed by an executive order granting clemency;

(d) Upon attaining the provisional release date; or

(e) Upon placement in a conditional release program pursuant to s. 947.1405.

History.— ss. 1, 2, 3, ch. 82-145; s. 2, ch. 83-87; s. 176, ch. 83-216; s. 2, ch. 84-328; s. 1, ch. 86-273; s. 2, ch. 87-110; s. 5, ch. 88-96; s. 8, ch. 88-122; s. 2, ch. 88-131.

Section 944.276
Florida Statutes (1987)
[1987 Fla. Laws ch. 87-2, § 1]

[1]944.276 Administrative gain-time.—

(1) Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity as defined in s. 944.598, the secretary of the Department of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such certification in writing, the secretary may grant up to a maximum of 60 days administrative gain-time equally to all inmates who are earning incentive gain-time, unless such inmates:

(a) Are serving a minimum mandatory sentence under s. 775.082(1) or s. 893.135;

(b) Are serving the minimum mandatory portion of a sentence enhanced by s. 775.087(2);

(c) Were convicted of sexual battery or any sexual offense specified in s. 917.012(1) and have not successfully completed a program of treatment pursuant to s. 917.012; or

(d) Were sentenced under s. 775.084.

(2) The authority granted to the secretary shall continue until the inmate population of the correctional system reaches 97 percent of lawful capacity, at which time the authority granted to the secretary shall cease, and the secretary shall notify the Governor in writing of the cessation of such authority.

History. - ss. 1, 2, ch. 87-2.

[1]**Note.** - Expires effective July 1, 1988, pursuant to s. 2, ch. 87-2, and is scheduled for review by the Legislature before that date.

Section 944.277
Florida Statutes (Supp. 1988)
[1988 Fla. Laws ch. 88-122, § 5]

944.277 Provisional credits.—

(1) Whenever the inmate population of the correctional system reaches 97.5 percent of lawful capacity as defined in s. 944.096, the Secretary of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such condition in writing, the secretary may grant up to 60 days of provisional credits equally to each inmate who is earning incentive gain-time, except to an inmate who:

(a) Is serving a sentence which includes a mandatory minimum provision for a capital offense or drug trafficking offense and has not served the number of days equal to the mandatory minimum term less any jail-time credit awarded by the court;

(b) Is serving the mandatory minimum portion of a sentence enhanced under s. 775.087(2);

(c) Is convicted, or has been previously convicted, of committing or attempting to commit sexual battery, incest, or a lewd or indecent assault or act;

(d) Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, or aggravated battery, and a sex act was attempted or completed during commission of the offense;

(e) Is convicted, or has been previously convicted, of committing or attempting to commit kidnapping, burglary, or murder, and the offense was committed with the intent to commit sexual battery;

(f) Is convicted, or has been previously convicted, of committing or attempting to commit false imprisonment upon a child under the age of 13 and, in the course of

committing the offense, the inmate committed aggravated child abuse, sexual battery against the child; or a lewd, lascivious, or indecent assault or act upon or in the presence of the child; or

(g) Is sentenced, or has previously been sentenced under s. 775.084, or has been sentenced at any time in another jurisdiction as a habitual offender.

(2) The Secretary's authority to grant provisional credits in increments not exceeding 60 days will continue until the inmate population of the correctional system reaches 97 percent of lawful capacity, at which time the authority granted to the secretary will cease, and the secretary shall notify the Governor in writing of the cessation of such authority.

(3) At such time as provisional credits are granted, the Department of Corrections shall establish a provisional release date for each eligible inmate incarcerated, which will be the tentative release date less any provisional credits granted.

(4) Any eligible inmate who is incarcerated on the effective date of an award of provisional credits shall receive such credits. Any inmate who is under any type of release supervision program of the department is not eligible for an award of provisional credits.

(5) Any inmate who is serving one or more sentences of imprisonment imposed as a result of an offense that occurred on or after July 1, 1988, and who receives 30 or more days of provisional credits must be released into the provisional release supervision program on his provisional release date, unless such inmate is also serving a sentence for an offense that occurred before July 1, 1988. Inmates who are released into the provisional release supervision program are not eligible for any additional gain-time. If an inmate has received a term of probation or community control to be

served after his release from incarceration, the period of probation or community control supervision must be substituted for the period of supervision under the provisional release supervision program.

(6) The terms and conditions of provisional release supervision must be specified in writing, and a copy must be given to the inmate at the time of his release from incarceration. The term of supervision must be equal to the number of provisional credits accrued, but may not exceed 90 days unless extended as provided in subsection (7).

(7) If an inmate violates any term or conditio of provisional release supervision, the Department of Corrections may take any of the following actions:

(a) Continue provisional release supervision.

(b) Extend the term of supervision not to exceed the total number of provisional credits the inmate has accumulated.

(c) Terminate the provisional release supervision and return the inmate to prison. If an inmate is returned to prison, credits accumulated as of the date of release to the provisional release supervision program may be canceled as prescribed by department rule.

(8) If an inmate absconds from provisional release supervision, the Department of Corrections may issue a warrant for his arrest as provided by s. 944.405. The failure of an inmate to report to the designated parole and probation office within 10 days after his release from incarceration constitutes a violation of the provisional release supervision program and will result in issuance of a warrant for arrest of the inmate.

(9) The Department of Corrections shall adopt rules to implement the provisional release supervision program.

History.—s. 5, ch. 88-122.

Section 944.277(1)
Florida Statutes (Supp. 1992)
[1992 Fla. Laws ch. 92-310, § 12]

944.277 Provisional Credits.—

(1) Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity, the Secretary of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such condition in writing, the secretary may grant up to 60 days of provisional credits equally to each inmate who is earning incentive gain-time, except to an inmate who:

(a) Is serving a sentence which includes a mandatory minimum provision for a capital offense or drug trafficking offense and has not served the number of days equal to the mandatory minimum term less any jail-time credit awarded by the court;

(b) Is serving the mandatory minimum portion of a sentence enhanced under s. 775.087(2);

[1](c) Is convicted, or has been previously convicted, of committing or attempting to commit sexual battery, incest, or any of the following lewd or indecent assaults or acts: masturbating in public; exposing the sexual organs in a perverted manner; or nonconsensual handling or fondling of the sexual organs of another person;

(d) Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, or aggravated battery, and a sex act was attempted or completed during commission of the offense;

(e) Is convicted, or has been previously convicted, of committing or attempting to commit kidnapping, burglary, or murder, and the offense was committed with the intent to commit sexual battery or a sex act was attempted or

completed during commission of the offense;

(f) Is convicted, or has been previously convicted, of committing or attempting to commit false imprisonment upon a child under the age of 13 and, in the course of committing the offense, the inmate committed aggravated child abuse; sexual battery against the child; or a lewd, lascivious, or indecent assault or act upon or in the presence of the child;

(g) Is sentenced, or has previously been sentenced, or has been sentenced at any time under s. 775.084, or has been sentenced at any time in another jurisdiction as a habitual offender;

(h) Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, aggravated battery, kidnapping, manslaughter, or murder against an officer as defined in s. 943.10(1),(2),(3),(6),(7),(8), or (9); or against a state attorney or assistant state attorney; or against a justice or judge of a court described in Article V of the State Constitution; or against an officer, judge, or state attorney employed in a comparable position by any other jurisdiction; or

(i) Is convicted, or has been previously convicted, of committing or attempting to commit murder in the first, second, or third degree under s. 782.04(1),(2),(3), or (4); or has ever been convicted of any degree of murder in another jurisdiction; or

(j) Is serving a concurrent sentence in another state or federal jurisdiction.

In making provisional credit eligibility determinations, the department may rely on any document leading to or generated during the course of the criminal proceedings involving the inmate, including, but not limited to, any

presentence or postsentence investigation or any information contained in arrest reports relating to circumstances of the offense.

History.—s. 5, ch. 88-122; s. 4, ch. 89-100; s. 5, ch. 89-526; s. 5, ch. 89-531; s. 2, ch. 90-77; s. 1, ch. 90-186; s. 14, ch. 90-337; s. 14, ch. 91-280; s. 12, ch. 92-310.

[1]Note.—

A. Section 3, ch. 90-186, provides that "[a] person who is convicted, or has been previously convicted, of committing prior to the effective date of this act a lewd or indecent assault or act specified in section 944.277(1)(c), Florida Statutes, is eligible for provisional credits. However, a person who is convicted or has been previously convicted, of committing or attempting to commit a lewd or indecent assault or act as a result of masturbating in public, exposing the sexual organs in a perverted manner, or nonconsensual handling or fondling of the sexual organs of another person is not eligible for provisional credits."

B. Section 19, ch. 90-337, provides that "[e]ffective July 1, 1990, an inmate convicted of a lewd or indecent act not listed in s. 944.277(1)(c), Florida Statutes, shall receive retroactive benefit of all provisional credit awards made during the service of his sentence, provided that he is not otherwise ineligible for, or excluded from, receiving such an award." Chapter 90-337 was signed into law on July 3, 1990.

Section 944.598
Florida Statutes (Supp. 1986)
[1986 Fla. Laws ch. 86-46, § 1]

944.598 Emergency release of prisoners.—

(1) The Department of Corrections shall advise the Governor of the existence of a state of emergency in the state correctional system whenever the population of the state correctional system exceeds 99 percent of the lawful capacity of the system for males or females, or both. In conveying this information, the secretary of the department shall certify the rated design capacity, maximum capacity, lawful capacity, system maximum capacity, and current population of the state correctional system. When the Governor verifies such certification by letter, the secretary shall declare a state of emergency.

(2) Following the declaration of a state of emergency, the sentences of all inmates in the system who are eligible to earn gain-time shall be reduced by the credit of up to 30 days gain-time, in 5-day increments, as may be necessary to reduce the inmate population to 98 percent of lawful capacity of the system.

(3) If a state of emergency still exists 15 days after the credit of gain-time pursuant to subsection (2), the secretary of the department and the Parole and Probation Commission, as appropriate to their respective functions, shall authorize, prior to scheduled release by parole, gain-time, or expiration of sentence, the early termination of incarceration of those inmates confined in state correctional facilities and serving sentences of 3 years or less, unless sentenced pursuant to s. 775.087 or s. 893.135, who are within the last 60 days prior to release by parole, gain-time, or expiration of sentence. The secretary and the commission

shall release such inmates by applying, in 5-day increments, credit for time served to all in this category.

(4) Within 15 days after the declaration of a state of emergency, the department shall supply the commission with the names of those inmates in the following categories, who shall be considered for compulsory conditional release:

(a) Any inmate confined in a state correctional facility with a sentence of 3 years or less, unless serving a mandatory minimum sentence, who is within the last 6 months prior to his release.

(b) Any inmate confined in a state correctional facility with a sentence of more than 3 years but less than 8 years, unless serving a mandatory minimum sentence, who is within the last year prior to his release.

(c) Any inmate confined in a state correctional facility with a sentence of 8 years or more, unless serving a mandatory minimum sentence, who is within the last 18 months prior to his release.

As used in this subsection, the term "compulsory conditional release" means a release from incarceration by commission action specifying the terms of release, including the period of time the person is subject to such conditions as the commission determines and subject to supervision as if on parole, but in no event may such supervision extend beyond the maximum term or terms for which he was actually sentenced. The commission shall consider all inmates not otherwise ineligible for parole who have maintained satisfactory institutional behavior and who are not serving a term of imprisonment for any "forcible felony" as defined in s. 776.08, for drug trafficking under s. 893.135, or as a habitual felony offender under s. 775.084.

(5) A violation of the terms or conditions of a compulsory conditional release pursuant to subsection (4)

may render the person released liable to arrest and return to prison to serve out the term for which he was sentenced. However, an offender whose compulsory conditional release is revoked may, at the discretion of the commission, be credited with any portion of his time he has satisfactorily served while on release. For the purposes of this section, the releasee shall be subject to the provisions of ss. 947.22, 947.23, and 947.26, as though such releasee were on parole.

(6) The authority granted in this section shall cease whenever the secretary certifies to the Governor that the level of inmate population has remained at less than 98 percent of the lawful capacity of the system for 5 consecutive days.

(7) As used in this section, the term:

(a) "State correctional system" means the system as defined in s. 944.02.

(b) "Lawful capacity" of the state correctional system means the total capacity of all institutions and facilities in the prison system as determined either by the Legislature or by the courts.

History. - ss. 3, 5, ch. 83-131; s. 1, ch. 86-46.

No. 95-7452

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

KENNETH LYNCE,

Petitioner,

v.

HAMILTON MATHIS, Superintendent,
Mayo Correctional Institution,
Florida Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE
U. S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUSAN A. MAHER
DEPUTY GENERAL COUNSEL
Florida Bar No. 0438359

Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500
(904) 488-2326

Counsel for Respondent

QUESTION PRESENTED

The Respondent modifies the Questions presented by Petitioner as follows:

I. Does the *Ex Post Facto* Clause forbid a state to cancel a prisoner's previously granted early release credits and nondiscretionary early release date established solely to address prison overcrowding through the retroactive application of offense-based exclusions from eligibility?

II. Does a state legislature deprive a prisoner of liberty without due process of law by retroactively cancelling lawfully granted early-release credits and a lawfully established early-release dated established solely through a mechanism for controlling prison overcrowding without providing adjudicatory procedures, when the overcrowding crisis ceases to exist?[1]

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[1] Respondent notes that although this is second question is contained in the Questions Presented For Review by the Petitioner, no substantial argument was made in the petition.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 10 provides in pertinent part:

> Section 10. No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .

* * *

United States Constitution, Amendment XIV, § 1, provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

The relevant Florida statutes are codified as:

Florida Statutes Section 944.276, 1987

Florida Statutes Section 944.277, Supp. 1988 and Supp. 1992

Florida Statutes Section 944.598, Supp. 1986

[These statutes have been reprinted in full in the appendix to Petitioner's brief.]

STATEMENT OF THE CASE

I. Historical Background of Florida's Overcrowding Statutes

Since 1983, the State of Florida has enacted a series of early release statutes specifically and solely designed to alleviate an overcrowding crisis which has plagued the state prison system over the last decade. In the face of a federal court consent decree on overcrowding and delivery of health services in the Florida prison system, the Florida Legislature opted to afford the Department of Corrections an emergency relief procedure to preclude the mass release of Florida inmates at the direction of the federal courts. *See Costello v. Wainwright*, 397 F.Supp. 20 (M.D. Fla. 1975), aff'd, 525 F.2d 1239 (5th Cir. 1976).

The first early release statute (Florida Statutes Section 944.598), enacted in 1983 and repealed in 1993, provided for the mandatory grant of emergency gaintime to all inmates within the prison system if the threshold of 99% of lawful capacity was reached. This statute was never implemented. Later overcrowding statutes administered by the Florida Department of Corrections (Florida Statutes Sections 944.276 and 944.277), enacted in 1987 and 1988, respectively, provided for the discretionary grant of credits to all inmates who met the criteria for such awards and who were not otherwise excluded by the statutes. The threshold levels required to trigger awards under these later statutes were below the 99% level of the original emergency release statute.

As the overcrowding crisis began to subside and in light of the grave concern for public safety, the Florida Legislature

commenced to narrow the categories of prisoners eligible for overcrowding release and various exclusions were added to the statutes. Prisoners convicted of murder offenses were not initially among the excluded classes under any of the overcrowding statutes. However, in 1990, the Florida Legislature removed from eligibility for early release for overcrowding any prisoner convicted of a murder offense. § 944.277(1)(i), Fla. Stat. (Supp. 1990). Simultaneously, the Florida Legislature enacted a new overcrowding mechanism which would transfer the responsibility for review and release of prisoners because of prison overcrowding from the Florida Department of Corrections to the Florida Parole Commission.[2] § 947.146, Fla. Stat. (1989). Like the overcrowding mechanisms previously administered by the Department, the control release statute administered by the Commission contained specific exclusions from eligibility for early release because of

---

[2] The primary reason for this transfer of responsibility was to allow for greater review of the individual prior to release because of prison overcrowding. In light of the Florida Parole Commission's expertise in parole reviews, the Florida Legislature determined that the Commission was in a better position to make release determinations in the interests of public safety as its staffing and function were designed specifically for that purpose. The overcrowding statutes administered by the Department of Corrections did not provide for individual review because the department was not structured to accomplish such reviews in a time frame that would allow releases sufficient to control prison overcrowding. To overcome the inability to conduct individualized reviews, the legislature included a built-in behavior indicator in the statute -- overcrowding credits could only be allocated to an otherwise eligible inmate if that inmate was also "earning incentive gain-time" This statutory restriction was not designed as an prison management or rehabilitative tool. Nor was this restriction intended as a reward to inmates for good behavior. It was simply a risk-assessment mechanism in furtherance of public safety concerns to assure that inmates with consistently unsatisfactory behavior would not be released early.

overcrowding.

As other measures, such as front-end diversionary programs and the building of additional prison beds, continued to reduce overcrowding concerns, the Florida Legislature systematically narrowed the pool of inmates eligible for very early release due to prison overcrowding. The legislature's efforts culminated in the retroactive cancellation in 1992 of early release credits for some groups of violent offenders, such as Mr. Lynce,[3] and ultimately, with the enactment of Florida's Safe Streets Act in June 1993,[4] the retroactive cancellation of all pending early release balances for prisoners in custody as well as those prisoners returned to custody after release on bond, escape, or revocation of supervision.

Florida has not made any releases because of prison overcrowding since December 1994.

II. Statement of The Case

Respondent accepts the Petitioner's rendition of the case and facts.

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[3] See § 944.277(1)(h),(i), Fla. Stat. (Supp. 1992); 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992).

[4] See Ch. 93-406, Laws of Fla., codified, in part, at Florida Statutes Section 944.278.

REASONS FOR DENYING THE WRIT

I. The Judgement of the Court of Appeals In *Lynce* Is Consistent With *Collins* And *Morales* And Is Distinguishable From *Weaver*

Petitioner Lynce seeks to liken the early release due to prison overcrowding to satisfaction of sentence and release due to the application of goodtime/gaintime earned by a prisoner. The allocation of overcrowding credits (provisional credits), a mechanism legislated solely for the purpose of controlling prison overcrowding, is not goodtime/gaintime to be earned by a prisoner. None of Florida's early release mechanisms for overcrowding were designed to foster rehabilitation, provide a prison management tool, or inure as a benefit or reward to a prisoner for good behavior in prison. Both the Florida Supreme Court and the Eleventh Circuit clearly recognized this very important factor in their decisions addressing Florida's early release statutes. Both courts specifically distinguished the cases dealing with early release due to prison overcrowding from those addressing basic and incentive gaintime. In *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994), Florida's highest court noted in addressing the provisional credits statute:

> In *Dugger v. Rodrick*, 584 So. 2d 2, 4 (Fla. 1991), this Court held that the state's unilateral decision to restrict the "provisional credit" does not trigger the constitutional issues that would be present if some other forms of credits or gain time were at stake. The reason is that provisional credits are not a reasonably quantifiable expectation at the time an inmate is sentenced. Rather, provisional credits are an inherently arbitrary and unpredictable possibility that is awarded based solely on the happenstance of prison overcrowding. Thus, provisional credits in no

> sense are tied to any aspect of the original sentence and cannot possibly be a factor at sentencing or in deciding to enter a plea bargain. As a result we held that provisional credits are not subject to the prohibition against ex post facto laws. *Id.*

Griffin, 638 So. 2d at 501, citing *Dugger* v. *Rodrick*, 584 So. 2d at 4.

Similarly, in a very recent decision, still pending a petition for rehearing when this Court rendered its decision in *Cal. Dept. of Corrections v. Morales*, ___ U.S. ___, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995), the Eleventh Circuit followed the *Griffin* rationale in addressing a later overcrowding mechanism, control release:

> The control release statute is quite different. It reduces an inmate's imprisonment automatically for the convenience of the Department of Corrections. The statute is procedural, not substantive like "good-time" gain time, and therefore is not ex post facto. *Rodrick*, 584 So. 2d at 4.
>
> Additionally, the retroactive application of control release does not actually disadvantage the petitioner by reducing his opportunity to shorten his time in prison. Because control release is based on an arbitrary and unpredictable determinant, the prison population level, an inmate has no reasonable expectation at the time he is sentenced that the prison population will reach the specified triggering level and that his incarceration will therefore be reduced.

Hock, 41 F.3d 1470, 1472 (11th Cir. 1995).

Both the Florida Supreme Court and the Eleventh Circuit analyzed the substance of Florida's early release statutes, not just the obvious effect. In so doing, the these courts recognized the very important fact that Florida's early release statutes merely provide procedural mechanisms to the executive bodies administering them to achieve the singular goal of controlling prison overcrowding. Mr. Lynce claims that the decision below is

irreconcilable with the holdings in *Weaver* and *Greenfield*. Petition at 7. On the contrary, the decision of the Eleventh Circuit is distinguishable from *Weaver v. Graham*, 450 U.S. 24 (1981). In *Weaver*, this Court considered the effect of a Florida statute which reduced the amount of automatic or basic gaintime applied to a prisoner's sentence upon incarceration.[5] Under the earlier 5-10-15 formula for award of automatic gaintime, a sentence of 10 years was automatically reduced to a sentence of approximately 6 years upon incarceration. Under the formula enacted in 1978 providing for a reduced formula of 3-6-9, a sentence of 10 years was only reduced to 8 years. Thus, the retroactive application of the later formula resulted in an increase in the lower end of the possible sentence range. Because the automatic gaintime was truly a determinant of the actual sentence imposed, the alteration of this determinant in a fashion that increased the initial penalty imposed ran afoul of the *Ex Post Facto* Clause.

Florida's early release mechanisms do not produce this same effect. There is no automatic reduction of sentence upon

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[5] The statutes in effect in 1976 that were considered in *Weaver* provided for automatic deductions from a prisoner's sentence of 5 days per month off the first and second years, 10 days per month off the third and fourth years, and 15 days per month off the fifth and all succeeding years. § 944.27(1), Fla. Stat. (1975). In 1978, the Florida legislature repealed the previous gaintime statute and enacted a new formula for automatic deductions of 3 days per month off the first and second years, 6 days per month off the third and fourth years, and 9 days per month off the fifth and all succeeding years. § 944.275(1), Fla. Stat. (1979). These deductions automatically were applied upon incarceration as a lump-sum deduction from sentence. *See Knuck v. Wainwright*, 759 F.2d 856 (11th Cir. 1985).

incarceration. There is no relationship between original length of sentence and the allocation of overcrowding credits. There is no predictability as to when or how many overcrowding credits would need to be allocated. Indeed on the date a prisoner committed his crime, there was no assurance that overcrowding would still be in effect on the date of incarceration. Thus, the actual penalty for the crime imposed was never altered by the allocation of overcrowding credits. A 10-year sentence on the date of incarceration was still a 10-year sentence.

In *Collins* v. *Youngblood*, 497 U.S. 37 (1990) and *Cal. Dept. of Corrections* v. *Morales*, 514 U.S. ___, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995), this Court has made clear that "the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' nor . . . on whether an amendment affects a prisoner's '*opportunity* to take advantage of provisions for early release,' (citation omitted), but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Morales*, 514 U.S.___, 131 L.Ed.2d at 595, n.3. In both *Collins* and *Morales*, the Court has emphasized that it is the "increase in the penalty by which a crime is punishable" which triggers the *ex post facto* prohibitions not just any potential disadvantage occasioned by a prisoner or change that results in an alteration of the actual length of confinement. The State of Florida did not change its mind as to the overall terms of imprisonment it believed appropriate as punishment for Petitioner Lynce's crimes. It simply

was faced with addressing an independent and somewhat unpredictable problem of overcrowding -- the fact that the Legislature devised various mechanisms to allow releases to control prison overcrowding did not in any way alter the punishment Petitioner was destined to receive on the date he committed his crime. Mr. Lynce had no way of knowing what the future might hold with regard to prison overcrowding and his potential to receive a very early release as a result. Neither the State of Florida nor the sentencing courts altered the punishment range under the state sentencing guidelines based upon prison overcrowding -- overcrowding was a phenomena addressed administratively by the Florida Legislature. Both Florida and the federal courts in this circuit have consistently determined that Florida's overcrowding statutes are remedial, administrative, and procedural statutes designed to address prison overcrowding rather than penal statutes designed to address punishments for crimes. These statutes do not offend the prohibition against ex post facto laws under either the *Collins* or *Morales* tests. The judgment of the Eleventh Circuit in *Lynce* is consistent with present *ex post facto* jurisprudence. No further review is warranted by this Court.

II. The Conflicting Decisions of the Tenth Circuit and A Texas Criminal Appellate Court Are Anomalies That Present No Substantial Conflict For Resolution

Petitioner Lynce urges the Court to grant his petition because the rationale and result of the lower court's disposition directly

conflict with *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991) and *Ex Parte Rutledge*, 741 S.W.2d 460 (Tex. Crim. app. 1987)(*en banc*). (Petition at 10.) Mr. Lynce points to a single federal circuit court decision and a single state criminal appellate court decision as providing substantial and sufficient conflict to warrant this Court's resolution. On the contrary, these decisions are anomalies which cannot serve as a basis to review the overwhelmingly consistent decisions in the state and federal courts in this circuit.

The Texas case, *Ex parte Rutledge*, 741 S.W.2d 460 (Tex.Crim.App. 1987) (*en banc*), was decided long before and without benefit of this Court's decisions in *Collins* and *Morales*. Thus, the result in *Rutledge* may well have been different and should not be viewed for purposes of establishing substantial conflict. Unlike *Rutledge*, however, the decision of the Tenth Circuit in *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991) was rendered after *Collins*. While the *Lynce* decision is indeed in conflict with the *Arnold* decision of the Tenth Circuit, *Arnold* is erroneously grounded in effect-based analysis of *Weaver v. Graham*, 450 U.S. 24 (1981), *Miller v. Florida*, 483 U.S. 423 (1987), and *Lindsey v. Washington*, 301 U.S. 397 (1937): the focus is on the potential lengthening of incarceration.[6] The *Arnold* court had before it for

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[6] As this Court noted in *Morales*, 514 U.S.___, 115 S.Ct. 1597, 131 L.Ed.2d 588, 595 n.3.,

> Our opinions in *Lindsey*, *Weaver*, and *Miller* suggested that enhancements to the measure of criminal punishment fall within the *ex post facto* prohibition because they operate to the "disadvantage" of covered offenders. See

review an appeal from a federal habeas in which the Oklahoma prisoner challenged an amendment to Oklahoma's prison overcrowding statutes which reduced his eligibility for emergency release due to overcrowding. In *Arnold*, the Tenth Circuit relied on an earlier decision of the Oklahoma Court of Criminal Appeals, *Ekstrand v. Oklahoma*, 791 P.2d 92 (Okla.Crim.App.1990) (citing *Weaver*), in which the Oklahoma court addressed whether an amended Oklahoma statute relating to "earned" credits was an *ex post facto* law when its application to prisoners resulted in the computing of fewer earned credits than under the statute before the amendment, thereby lengthening the prisoners' sentences. *Id.* at 93. In *Ekstrand*, "[a]fter comparing the potential for earning credits before and after amendment, the [Oklahoma] court concluded that the amendment was disadvantageous". *Id.* at 94. Based on that factor, and that factor alone, the Oklahoma court declared the amendment in violation of the *ex post facto* clause.

In adopting *Ekstrand*, the Tenth Circuit rejected another decision of the Oklahoma Court of Criminal Appeals, *Barnes v.*

> *Lindsey*, 301 US, at 401, 81 L Ed 1182, 57 S Ct 797; *Weaver*, 450 US, at 29, 67 L Ed 2d 17, 101 S Ct 960; *Miller*, 482 US, at 433, 96 L Ed 2d 351, 107 S Ct 2446. But that language was unnecessary to the results in those cases and is inconsistent with the framework developed in *Collins v. Youngblood*, 497 US 37, 41, 111 L Ed 2d 30, 110 S Ct 2715 (1990). After *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor, as the dissent seems to suggest, on whether an amendment affects a prisoner's "opportunity to take advantage of provisions for early release," see post, at ___, 131 L.Ed. 2d, at 602, but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

Oklahoma, 791 P.2d 1010 (Okla.Crim.App.1990), in which Oklahoma, like Florida, drew a distinction between credits earned for good behavior, which were the subject of the *Ekstrand* decision and emergency credits meted out to alleviate prison overcrowding. As Florida's courts and the federal district courts in this circuit have recently done, the Oklahoma court concluded that prison overcrowding was unrelated to a prisoner's crime and could not be viewed as a consequence attached to the crime at the time it was committed. As a result, eligibility for emergency release due to overcrowding never ventured into the realm subject to ex post fact analysis. The Tenth Circuit rejected the state court's determination of the nature of emergency overcrowding credits, finding no difference between "earned" credits and "emergency" credits. Such a matter is a determination of state law that should not have been disturbed. When closely analyzed, the *Arnold* court's sole test for whether an *ex post facto* violation occurred was whether Arnold himself was disadvantaged. This factor alone is an incorrect test in assessing an ex post facto challenge. This singular, conflicting decision is founded on an incorrect test and does not provide a compelling basis for this Court to review the overwhelmingly consistent decisions of the state and federal courts within this circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SUSAN A. MAHER
DEPUTY GENERAL COUNSEL

Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500
(904) 488-2326

Counsel for Respondent

Dated: April 8, 1996

(A)

No. 95-7452

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KENNETH LYNCE,
Petitioner

v.

HAMILTON MATHIS, SUPERINTENDENT, TOMOKA CORRECTIONAL INSTITUTION, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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JOINT APPENDIX

JOEL T. REMLAND
Assistant Federal
Public Defender
80 N. Hughey Avenue
Suite 417
Orlando, FL 32801
(407) 648-6338
Counsel for Petitioner

SUSAN A. MAHER
Deputy General Counsel
Department of Corrections
2601 Blair Stone Road
Tallahassee, FL 32399
(904) 488-2326
Counsel for Respondents

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 10, 1996
CERTIORARI GRANTED MAY 13, 1996

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDING
8/18/94	PETITION for writ of habeas corpus
1/20/95	RESPONSE by petitioner Kenneth Lynce to Magistrate Judge's oral order of 01-04-95
3/6/95	RESPONSE by respondent Harry K. Singletary Jr. to petition for writ of habeas corpus and response to show cause order entered February 21, 1995
3/14/95	REPORT AND RECOMMENDATIONS of Magis. Judge David A. Baker. That the petition for writ of habeas corpus be denied and the case be dismissed with prejudice. Objections to R and R due by 3/31/95. ctc
4/24/95	OBJECTIONS by petitioner Kenneth Lynce to report and recommendations
5/10/95	ENDORSED ORDER approving report and recommendations, denying petition for writ of habeas corpus. Case dismissed with prejudice.
6/16/95	ORDER denying petitioner's application for certificate of probable cause

[Filed Aug. 18, 1994]

FORM FOR USE IN APPLICATIONS
FOR HABEAS CORPUS UNDER U.S.C. § 2254

NAME: Kenneth Lynce, et. al.

PRISON NUMBER: 352641

NAME OF PLACE OF CONFINEMENT:
Tamoka Correctional Institution

ADDRESS OF PLACE OF CONFINEMENT:
3950 Tiger Bay Road
Daytona Beach, FL 32124

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Case No. 94-891-CIV-ORL-18

KENNETH LYNCE,
Petitioner,
vs.

SUPERINTENDENT HAMILTON MATHIS, *et. al.*,
Respondent,
and

THE ATTORNEY GENERAL OF THE STATE OF FLORIDA,
ROBERT BUTTERWORTH,
Additional Respondent.

* * * *

PETITION

1. Name and location of court which entered the judgment under attack: Ninth Judicial Circuit Court, Orange County, Florida

2. Date of judgment of conviction: April 14, 1986
3. Length of sentence: 22 years
4. Sentencing judge: Judge Walter Komanski
5. Nature of offense or offenses for which you were convicted: First Attempter Murder Burglary, Sale & Delivery of Cocaine
6. What was your plea? (Check one)
   (a) Not guilty ( )
   (b) Guilty (✔)
   (c) Nolo contendere ( )

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: N/A
7. Kind of trial (Check one)
   (a) Jury ( ) (b) Judge only (✔)
8. Did you testify at the trial? Yes ( ) No (✔)
9. Did you appeal from the judgment of the conviction?
   (Yes) No (✔)
10. If you did appeal, answer the following:
    (a) Name of Court No
    (b) Result N/A
    (c) Date of Result N/A

    If you filed a second appeal or filed a petition for certiorari in the Florida Supreme Court or the United States Supreme Court, give details: No
11. State *concisely* every ground on which you claim you are being held unlawfully. Summarize *briefly* the facts supporting each ground.

CAUTION:

In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by a plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequence of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and

seizure, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).

(e) Conviction obtained by violation of the privilege against self-incriminaton.

(f) Convction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by the violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Futility exemption to exhaustion of requirement of state remedies.

Supporting FACTS (tell your story *briefly* without citing cases or law):

See Memorandum of Law

Exhaustion of ground one in the state courts:

(1) Did you raise ground one in the appropriate Florida District Court of Appeals on a direct appeal of your conviction? Yes( ) No (✔)

(2) After your conviction did you raise ground one in the state circuit court that sentenced you by filing a Florida Rule 3.850 Motion to Vacate, Set Aside, or Correct Sentence?

Yes ( ) No ( )

(a) If your answer is "yes", then state:

i. Whether you received an evidentiary hearing N/A

ii. The result N/A

iii. The date of the result N/A

(b) If your Rule 3.850 Motion was denied, then did you file an appeal of that denial with the appropriate Florida District Court of Appeals? Yes ( ) No (✔)

i. If you failed to appeal the denial of your Rule 3.850 motion, then explain briefly why you did not N/A

(3) Have you raised ground one in any other petition, application, or motion filed in the state courts of Florida? Yes ( ) No ( )

If your answer is yes, then give the details, including the grounds raised, the court's decision, and the date of said decision for each such petition, application, or motion. N/A

B. Ground two: Petitioner is entitled to a Temporary Restraining Order and Preliminary Injunction.

Supporting FACTS (tell your story *briefly* without citing cases or law):

See Memorandum of Law

Exhaustion of ground two in the state courts:

(1) Did you raise ground two in the appropriate Florida District Court of Appeals on a direct appeal of your conviction? Yes ( ) No (✔)

(2) After your conviction did you raise ground two in the state circuit court that sentenced you by filing a Florida Rule 3.850 Motion to Vacate, Set Aside, or Correct Sentence?

Yes ( ) No (✔)

(a) If your answer is "yes", then state:

i. Whether wou received an evidentiary hearing N/A

ii. The result N/A

iii. The date of the result N/A

(b) If your Rule 3.850 Motion was denied, then did you file an appeal of that denial with the appropriate Florida District Court of Appeals? Yes ( ) No (✔)

i. If you failed to appeal the denial of your Rule 3.850 motion, then explain briefly why you did not N/A

(3) Have you raised ground two in any other petition, application, or motion filed in the state courts of Florida? Yes( ) No (✔)

If your answer is yes, then give the details, including the grounds raised, the court's decision, and the date of said decision for each such petition, application, or motion N/A

C. Ground three: Reinterpretation of provisional creits laws is a violation of the ex post facto law.

Supporting FACTS (tell your story *briefly* without citing cases or law):

See Memorandum of Law.

Exhaustion of ground three in the state courts:

(1) Did you raise ground three in the appropriate Florida District Court of Appeals on a direct appeal of your conviction? Yes ( ) No (✔)

(2) After your conviction did you raise ground three in the state circuit court that sentenced you by filing a Florida Rule 3.850 Motion to Vacate, Set Aside, or Correct Sentence? Yes ( ) No (✔)

(a) If your answer is "yes", then state:

i. Whether you received an evidentiary hearing N/A

ii. The result N/A

iii. The date of the result N/A

(b) If your Rule 3.850 Motion was denied, then did you file an appeal of that denial with the appropriate Florida District Court of Appeals? Yes ( ) No (✔)

i. If you failed to appeal the denial of your Rule 3.850 motion, then explain briefly why you did not N/A

(3) Have you raised ground three in any other petition, application, or motion filed in the state courts of Florida? Yes ( ) No (✔)

If your answer is yes, then give the details, including the grounds raised, the court's decision, and the date of said decision for each such petition, application, or motion N/A

D. Ground four: N/A

Supporting FACTS (tell your story *briefly* without citing cases or law): N/A

Exhaustion of ground four in the state courts:

(1) Did you raise ground four in the appropriate Florida District Court of Appeals on a direct appeal of your conviction? Yes ( ) No (✔)

(2) After your conviction did you raise ground four in the state circuit court that sentenced you by filing a Florida Rule 3.850 Motion to Vacate, Set Aside, or Correct Sentence? Yes ( ) No (✔)

(a) If your answer is "yes", then state:

i. Whether you received an evidentiary hearing.

ii. The result N/A

iii. The date of the result N/A

(b) If your Rule 3.850 Motion was denied, then did you file an appeal of that denial with the apropriate Florida District Court of Appeals? Yes ( ) No (✔)

i. If you failed to appeal the denial of your Rule 3.850 motion, then explain briefly why you did not N/A

(3) Have you raised ground four in any other petition, application, or motion filed in the state courts of Florida? Yes ( ) No (✔)

If your answer is yes, then give the details, including the grounds raised, the court's decision, and the date of said decision for such petition, application, or motion N/A

12. Other than a direct appeal and other than the post conviction motions disclosed in your answer to question 11 above regarding exhaustion of state remedies, have you previously filed any petitions, applications, or motions with respect to this judgment and conviction in any court, state or federal?

Yes ( ) No (✔)

13. If your answer to 12 was "yes", give the following information:

(a) (1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No (✔)

(5) Result N/A

(6) Date of result N/A

(b) As to any second petition, application or motion give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No (✔)

(5) Result N/A

(6) Date of result N/A

(c) Did you appeal to the highest court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes ( ) No (✔)

(2) Second petition, etc. Yes ( ) No (✔)

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No (✔)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At the preliminary hearing N/A

(b) At arraignment and plea N/A

(c) At trial N/A

(d) At sentencing N/A

(e) On appeal N/A

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ( ) No (✔)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (✔)

(a) If so, give name and location of court which imposed sentence to be served in the future: N/A

(b) And give date and length of sentence to be served in the future: N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ( ) No (✔)

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I UNDERSTAND THAT ANY FALSE STATEMENT OR ANSWER TO ANY QUESTIONS IN THIS APPLICATION WILL SUBJECT ME TO THE PENALTIES OF PERJURY (A FINE OF $10,000 OR IMPRISONMENT FOR FIVE (5) YEARS, OR BOTH).

I declare that under penalty of perjury that the foregoing is true and correct.

Executed on 8-15-94

/s/ Kenneth Lynce A-35-26-41

_____

Signature of Attorney (If Any)

[Filed Aug. 18, 1994]

IN THE UNITED STATES DISTRICT COURT
OF THE MIDDLE DISTRICT OF FLORIDA

Case Number: 94-891-CIV-ORL-18

KENNETH LYNCE, *et. al.*,
Petitioner,

v.

HAMILTON MATHIS, Superintendent,
Respondent.

MEMORANDUM OF LAW

This is an memorandum of law to a petition for writ of habeas corpus, pursuant to U.S.C. Title 28, § 2254.

KENNETH LYNCE #352641
Tomoka Correctional Institution
3950 Tiger Bay Road
Daytona Beach, FL 32124

GROUND ONE

While this petitioner fully respects the principles of comity which underlie the federal system of collateral review and also fully understands the requirements of exhausting state judicial review, he claims exemption to this rule under futility exemption.

> Under limited circumstance, such as cases where presentation to state courts would be futile due to adverse Supreeme Court precedent, federal courts may excuse habeas petitioners from compliance with the exhaustion requirement 28 U.S.C.A. § 2254 (b & c).

Futility brought about by afverse precedent is sufficient to make exhaustion of state remedies unnecessary for habeas corpus purposes. If the state's highest court has recently rendered an adverse decision in an identical case and if there is no reason to believe state court would change its position, federal court should not dismiss the petitioner for federal habeas corpus for failure to exhaust state remedies. *Layton v. Carson*, 479 F. 2d 1275 (5th Cir. 1973); *Spencer v. Texas*, 385 U.S. 554, 87 S. Ct. 648 (1967).

In *Dugger v. Rodrick*, 584 So. 2d 2 (Fla. 1991) and *Dugger v. Grant*, 610 So. 2d 428 (Fla. 1992), the Florida Supreme Court addressed the substantially similar to the present case. In *Grant*, an inmate convicted of Second Degree Murder and receiving provisional and administrative gaintime credits, lost these credits retroactively and in the future should such credits be awarded once more. Since there is no reason to expect that the Florida Supreme Court would depart from its precedent in Rodrick and *Grant*, it is apparent that any efforts to exhaust state remedies, would only served to force the petitioner to postpone his federal hearing until he has completed a useless progression through the state remedial machinery and forestall the wasteful use of judicial resources resulting from vain application to the state courts. (note, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1099-1100).

Technical exception to exhaustion requirement; although referring to claims of "technical exhaustion" at the state level, in *Galtieri v. Wainwright*, 582 F. 2d 348 (5th Cir. 1978), the same logic in determining the petition at hand exhausted applies. There are thousands of inmates who were affected adversely by the December 1992 decision by the Florida Department of Corrections to revoke all of their previously awarded provisional and administrative gaintime credits. Yet, over one year later, these inmates have struggled through a maze of adminis-

trative and judicial redress attempting to find a adequate remedy for their situation knowing all the time there wasn't one in the state administrative or judicial branch of government. It should appear of great concern to this court that so few of these affected inmates have even attempted redress. It is this petitioner's contention that this is due mainly to the confusing requirements necessary to begin such an arduous legal task.

Considering 1). the average educational level of these inmates, 2). the shortage of qualified law clerk (as few as 2 per a population of 1000) at some institution that are certified and further lack of experienced inmate clerks in the matter of procedural law and 3). the lack of pro bono or court appointed attorneys available to this petitioner and those similarly situated, this petitioner respectfully asks this court to consider a further exemption to the exhaustion requirement based upon Florida's voerly complicated, technical and time-consuming requirements for redress at the administrative and state levels.

Previous legal situations regarding the Florida Department of Corrections onerously changing awards of gaintime (i.e. *Waldrup v. Dugger,* supra; *Weaver v. Graham,* 450 U.S. 24 (1981); *Raske v. Martinez,* 876 F. 2d 1496 (11th Cir. 1989), took up to five years to resolve in the mechanically administered legal system, resulting in a decision in favor of the inmate petitioners, a mandamus being ordered against the Florida Department of Corrections for not complying timely with adjusting affected inmate's gaintime, and many inmates being "emergency released" because, after gaintime adjustment, they had been incarcerated beyond their actual release dates.

Petitioner seeks the avoidance of a repeat of this situation in the instant case. This is particularly important to this petitioner because his release date according to the law that awarded the gaintime has expired since October 1, 1992. *See Exhibit 1.*

GROUND TWO

The Petitioner petition this Honorable Court for atemporary restraining order and/or preliminary injunction to restore the revoked provisional credits, allow him to be eligible for further provisional credit awards and to restore his status of freedom with all privileges which were revoked as natural or actual consequences of the revoking of said release credits.

On October 1, 1992 the Petitioner was released from the custody of the Department of Corrections. On June 10, 1993 the Petitioner was reincarcerated in the Department of Correction, pursuant to an opinion by the Attorney General of the State of Florida, reinterpreting Florida Statute Section 944.277 and Florida Administrative 33-28.001 and thus making Petitioner and all other similarly situated inmates with murder charges ineligible for provisional release credits past and future. *See Exhibit 2.*

During this period of reclassification, Petitioner was ordered back to close custody institution, shackled, handcuffed and transported to Central Florida Reception Center. This reclassification was done on the Petitioner although he has EOS his sentence and the Department of Corrections didn't have anymore jurisdiction on his person.

In addition, classification at Central Florida Reception Center informed the Petitioner that all his accured provisional release credits had been revoked thus altering his release date from October 1, 1992 to November 5, 1998. This now makes him ineligible for work release and other associated privileges and deprived him of his liberty.

Petitioner will also be ineligible for further provisional release credits which may be granted in the coming years depending upon population and overcrowding situation.

Petitioner is entitled to a temporary restraining order against the Respondent in this cause. A litigant may be

granted a temporary restraining order (TRO) by a federal court upon a showing that the Petitioner is in danger of immediate and irreparable injury, that the adverse party will not be substantially harmed if a (TRO) is granted, that the (TRO) is consistent with public interest and that the Petitioner has a strong likelihood of success in the lawsuit. *Murphy v. Society of Real Appraisers,* 388 F. Supp. 1046, 1049 (E.D. Wisc. 1975).

a. *Irreparable Injury*

The loss of constitutional rights, even for short period of time, constitute irreparable injury. *Elrod v. Burns,* 427 U.S. 347, 373 (1976) & *Deerfield Medical Center v. City of Deerfield Beach,* 662 F. 2d 328, 338 (5th Cir. 1981).

Petitioner's due process constitutional rights as set forth in the United States Constitution, ex post facto clause will be violated by the revoking of provisional credits already granted and the reinterpretation of laws already in effect at the time of Petitioner's offense, thus adding time to a sentence he has already expired legally.

Petitioner's Eighth Amendment and any other applicable constitutional rights were clearly violated when he was reincarcerated and place back into the custody of the Department of Corrections pursuant to the aforementioned opinion.

It will take years for the Petitioner to complete all of the administrative and state level remedies before this issue will receive full redress from any court.

There is no other adequate remedy of law. The "grievance system of the Florida Department of Corrections has been certified by the Attorney General Office of the United States, thus requiring exhaustion of administrative remedies even before Petitioner can begin legal action within this court system. Petitioner is guaranteed to be turned down at all levels of the administrative and

state level, especially since the opinion/order came down from the Florida Attorney General Office in which they don't have any jurisdiction whatsoever to resolve or remedy this issue. It is an effort in futility until Petitioner can get a court hearing which is years away. Thisis his only avenue of recourse while he begins this process and later seek appropriate legal action.

The Petitioner has loss his liberty in violation of due process ex post facto constituting cruel and unusual punishment. Now separated from his family, love ones and friends in total violation of his United States Constitutional rights. In the meantime, irreparable and serious injury has being done and continue as long as he is in custody on a sentence he has legally completed in accordance to Florida's laws in existence at the time.

b. *Absence of harm to the adverse party*

The Respondent(s) have no legitimate interest in revoking the Petitioner's provisional credits and depriving him of his liberty without a court order.

The Respondent's main interest in revoking Petitioner's provisional credits is to quell public outcry over the early release of Donald McDugall. Violating the Petitioner's and many other similarly situated inmates constitutional rights to shift blame or buy time makes as much constitutional sense as arresting all the Black males in this country on the premise that since many will be in prison or on probation, the public will be safer if they're all locked up. Yes, crime rates would likely decrease, but ¾ of the Black men in this country would have their constitutional rights severely violated. Individual rights, no matter how disrefranchised the group, are the basis of this country's political and legal foundation.

If I lose these credits, serve additional years in prison, lose my freedom and the income I could have been making, etc. and win on the merits two-three years from

now, I will never regain the loss and pecuniary damages will not be able to make up for it.

c. *Public Interest*

It is in the public interest that government official act in a lawful manner and not violate their own rules, regulation, statutes or the constitution. The Supreme Court has stated that injunctive relief should be "conditioned by the necessities of the public interest which (the rules, regulation or laws) . . . sought to protect." *Hecht Co. v. Rowles*, 321 U.S. 321, 330, 64 S. Ct. 587 (1944). The intent of government in passing its laws and requiring prison officials to comply with laws "is a public interest aspect which cannot be ignored." Id at 339-340.

All public officials and employees has taken an oath to support the Constitution of the United States and of the States of Florida, pursuant Florida Constitution Article II, Section 5 and Florida Statute Section 876.05.

On October 1, 1992, Respondent clearly violated Florida Statute Section 944.277 and Florida Administrative Code 33-28.001 when they revoked Petitioner's provisional release credits and deprived him of his liberty, and prohibit him from earning further credits toward release thereby increasing his prison sentence that has been expired.

It is in the public interest that the law of the land is followed and the law states that Petitioner should receive provisional release credits, past and future.

d. *Likelihood of ultimate success on the merits*

Petitioner likelihood of winning final judgment on the issue of his provisional release credits is overwhelming.

Repeatedly, the Department of Corrections and the State have been found to violate the ex post facto when the pass new rulings which adversely affect certain groups of inmates. Consequently, they have forced these inmates

to bide their time as the ever slower wheels of justice grind out a decision in the inmate's favor.

Florida Statute Section 944.277 and Administrative Code Section 33-28.001 created a liberty/vested interest, right and entitlement for the petitioner. The Supreme Court has held that state-created liberty interest may be found in "statutes or other rules." *Connecticut Board of Pardons v. Cunschat*, 452 U.S. 458, 101 S. Ct. 2460 (1981).

Most federal courts have held that a state regulation or directives is sufficient to creat a liberty interest as well. *Parker v. Cook*, 642 F. 2d 865 (5th Cir. 1985) & *Gorham v. Hutto*, 667 F. 2d 1146 (4th Cir. 1981).

Petitioner concedes that not every statute or regulation creates a liberty interest but if a statute or regulation limits the discretion of state officials by providing that they may or must take some action only under certain prescribed circumstances, the statute or regulation creates a liberty interest or entitlement or right.

Thus, in *Greenhultz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S. Ct. 2100 (1979), the state parole provided that an eligible prisoner would be released *unless* the board found on of four disqualification applicable.

Florida Statute Section 944.277 (1988) specifically states: Thus, inmates with a second degree murder or attempted murder were eligible for provisional release credits "unless a sex act was attempted or completed during the commission of the offense."

In 1989, this statute was revised to disqualify those convicted of second degree murder or attempted murder committed or or after January 1, 1990. Petitioner's crime occurred ————————. Note: As created by S. 4, Chapter 89-100, applicable to offenses commited on or after January 1, 1990. *Florida Statute Section 944.277 (1989).*

Because this statute creates an expectancy of release unless on of certain prescribed conditions exist. The Supreme Court held that a protectable entitlement was created. Id. 44 U.S. at 11-12. See also *Hewitt v. Helms*, 103 S. Ct. 864, 871 (1983) ("the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the state has created a protected liberty interest.")

The State of Florida created further expectation of release through adoption of Florida Administrative Code Section 33-28.001 provisional credits:

(1) Eligibility. All incarcerated offenders, including those in the reception process, those in the custody of another agency and those in contracted facilities while actively serving a Florida sentence, who are earning incentive gain time and who are not otherwise ineligible as provided in subsection (2) shall be awarded provisional release credits.

(2) Ineligibility. No inmates shall be eligible to receive provisional release credits if the crime was committed on or after January 1, 1990 and wither the current or a previous conviction was for committing or attempting to commit murder in the First, Second, or third degree under § 782.04(1)(2)(3) or (4), of Florida Statute or has ever been convicted of any degree of murder in another jurisdiction.

The Petitioner submits that he and the Florida Department of Corrections both had an expectation of his release, because he was eventually released on it with according privileges as clearly stipulated in accordance with state law.

The Petitioner an anticipate that the state will not ony argue that he has no vested or liberty interest in receiving provisional release credits, but that this is due to the fact it is discreionary and seperate and appart from incentive gain time or basic gain time. (See Florida Statute Section 944.275)

In reality, provisional release credits were lace more automatic and mandatory than incetive gain time and not quite as mandatory as basic gain time.

Provisional release credits are calculated off an inmates release date the same as incentive or basic gain time days off are calculated. The only difference is in the way the amount of time-off is arrived at. These are not apples and orange we're discussing here but merely the difference between golden delicious, granny and Washington reds. Although, provisional credits is the statutory language of this gain time, it is still known in the Department of Corrections as administrative gain time.

1. Provisional Release Credits (Administrative Gain Time) are awarded off all eligible inmate sentences when the prison population reaches 97.5% of the lawful capacity as defined in Florida Statute Section 944.096 (1989) (revised to 98% in Florida Statute Section 944.096 (1992).

2. Basic Gain Time is awarded automatically off all eligible inmates sentences at the beginning of their incarceration. 10 days off for every 30 to be served ("⅓ off the top"). Florida Statute Section 944.275(4)(a).

3. Incentive Gain Time is awarded off all eligible inmate sentences where the inmate works to certain standards prescribed in Florida Statute Section 944.275 (b) and Administrative Code Section 33-11.

Release Credits or Gain Time . . . the terms may be different, but the concept is still the same. Both are protected vested or liberty interests. Both were established under the auspices of the Florida Legislature and the Petitioner is entitled to receive same. None is constitutionally required and a matter of keeping down inmate population and serving as a positive reinforcement for good behavior (even with provisional credits, a disciplinary report, prohibited earning provisional release credits (administrative gain time) for two (2) months).

GROUND THREE

Reinterpretation of Florida Statute Section 944.277 and Florida Administrative Code Section 33-28.001 constitutes unconstitutional ex post facto law as applied to Petitioner convicted of any murder offenses prior to January 1, 1990. "No State shall . . . pass any . . . expost facto law . . ."

In *Weaver v. Graham*, 450 U.S. 24, 101 S. ct. 960 (1981); *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989); *Knuck v. Wainwright*, 759 Fed. Rep. 856 (may 6, 1985) & *Waldrup v. Dugger*, 562 So. 2d 687 (Fla. 1990) are controlling in this case and uphold that when the Department of Corrections changes laws after an inmates's offense which make a sentence more onerous upon that inmate, an ex post facto violation has occurred.

If a new provisional constricts the inmate's opportunity to earn early release and thereby makes more onerous the punishment for crimes committed before its enactment, this result runs afoul of the prohibition against ex post facto laws *Weaver* 450 U.S. at 35-36, 101 S. Ct. at 968. this is obviously the case with the Petitioner who's sentence will not only be extended, but where the state actually took back provisional release credits already given him in 1987 and he was later released from prison and reincarcerated on the exact same conviction.

The courts in *Weaver and Raske* have both held that even if a rule is discretionary, or a matter of legislature grace, this chaaacterization does not prevent an ex post facto violation occurring as applied to Petitioner in this cause.

Even a statute merely alters penal provisions accorded by the grace of the legislature, it violates the [ex post facto] if it is both retrospective and more onerous than the law in effect at the date of the offense". *Weaver*, 450 U.S. at 30-31, 101 S. Ct. at 965. Since there is no constitutional requirement to receive any gain-time at all

(thus no "vested interest" in the state's opinion) and the ex post facto clause has repeatedly been held applicable, there can be no distinction in the instant case.

The facts in *Weaver*, *Raske*, *Waldrup* and *Knucke* are nearly identical to the instant case and the Petitioner would like for this court to take judicial notice to this fact. The Respondent(s) are forcing inmates to bide their time while this matter is settled in court. They are deliberately sandbagging the issue with every major change of law (Knucke, 1985 regarding 1983 changes; Weaver, 1981 regarding 1978 changes & Raske, 1989 regarding 1983 changes), years have passed between the wrong and the "end of justice being served."

Petitioner contends that the Respondent(s) have shown "bad Faith" and a "deliberate indifference" toward his constitutional and legal rights in order to keep him in a state of bondage and servitude, to wait until the public calms down and years pass while this issue is settled for the Petitioner within conventional legal channels.

It is well established that a penal statute violates the ex post facto clause if after a crime has been committed, it increases the penalty attached to that crime. The United Supreme Court clearly established this principle in the early case of *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648 (1798, and has adhered to this basic definition ever since. E.g. *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 963, 67 L. Ed. 2d 17 (1981) (citing *Calder*, 3 U.S. (3 Dall.) at 390).

The policy underlying this prohibition is "to assure that legislative Acts give fair warning of their effects and permit individuals to rely on their meaning until explicitly changed." Id., 450 U.S. at 28-29, 101 S. Ct. at 963-64 (citing *Dobbert v. Florida*, 432 U.S. 282, 298, 97 S. Ct. 2290, 2300, 53 L. Ed. 2d 344 (1977); *Kring v. Missouri*, 107 U.S. 221, 229, 2 S. CT. 443, 449, 27 L. Ed. 506 (1883); *Calder*, 3 U.S. (3 Dall.) at 396 (Patterson, J.); The Federalist No. 44 (J. Madison) & No. 84 (A.

Hamilton). Equally, the ex post facto clauses of the constitution "restrict[] governmental power by restraining arbitrary and potentially vindictive legislation." Id., 450 U.S. at 29, 101 S. Ct. at 964 (citing *Malloy v. South Carolina*, 237 U.S. 180, 183, 35 S. Ct. 507, 508, 59 L. Ed. 905 (1915); *Kring*, 107 U.S. at 229, 2 S. Ct. at 449; *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138, 3 L. Ed. 162 (1810); *Calder*, 3 U.S. (3 Dall.) at 396.

A retroactive law, however, is not ex post facto unless two critical elements are present: The law must apply to events occurring before its enactment, and it must disadvantage the offender. Id. (Citing *Lindsey v. Washington*, 301 U.S. 397, 401, 57 S. Ct. 797, 799, 81, L. Ed. 1182 (1937); *Calder*, 3 U.S. (3 Dall.) at 390.

In *Harris v. Wainwright*, 376 So. 2d 856 (Fla. 1979), the court held that gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied. The United States Supreme Court in *Weaver* directly overruled *Harris*, finding that [c]ontrary to the reasonsing of the Supreme Court of Florida, a law need not impair a "vested right" to violate the ex post facto prohibition . . . critical to relief under the Ex Post Facto Clause is not an individual's rights to less punishment, but the lack of fair notice and governmental restraint when the legislature increases the punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more oneous than the law in effect on the date of the offense.

The Eleventh Circuit has reached this conclusion in a recent case raising exactly the issue before this Court today. *Raske*, 876 F. 2d at 1499-1500. We agree with the Eleventh Circuit's analysis in *Raske* said the United States Supreme Court. Even "grace" of the legislature, once given cannot be rescinded retrospectively. The Florida Supreme Court agreed with the Department of Corrections that gain time statutes do not create vested rights until gain time actually is awarded, subject to all other applicable statutory conditions. Therefore, the provisional release credits AKA (administrative gain time) has been admittedly confirmed to be a "vested right" by the Department of Corrections and Florida Supreme Court in this cause, once it has been awarded.

The Petitioner's provisional release credits (Administrative Gain Time) had been awarded and he had been discharged from the Department of Corrections under the applicable statutory conditions, entitle him to be released immediately.

Subsequently, if this Honorable Court requires the Department of Corrections to apply and reinstate the provisional release credits and release the Petitioner, the equal protection clauses of the state and federal constitutions require that Department of Corrections shall treat all other similarly situated inmates the same.

CONCLUSION

The temporary restraining order should be granted without further delay for notice of purpose because of the risk of loss of various constitutional and legal rights ultimately his freedom. Petitioner has placed a copy of these papers in the mail to each of the Respondents and has attached an affidavit herewith.

Even if this court finds that Petitioner is not entitled to a temporary restraining order, it should grant Petitioner a preliminary injunction after notice to the Respondents. Petitioner has gone ahead and served notice on same.

A preliminary injunction may be granted uponnotice based on consideration of the same four factors discussed in this writ. *supra. Florida Medical Association, Inc. v. U.S. Dept. of HRS*, 601 F. 2d 199 (5th Cir. 1979). Petitioner incorporates that discussion by reference at this juncture.

WHEREFORE, the court should grant a temporary restraining order or in the alternative, a preliminary injunction directing the Respondent to:

1. Restore Petitioner's Provisional Release Credits.
2. Restore his eligibility for future Provisional Release Credits.
3. Restore his freedom by ordering he be released from the custody of the Department of Corrections immediately.
4. Any further actions this court deems necessary at this time.

Respectfully submitted,

/s/ Kenneth Lynce A-35-26-41
KENNETH LYNCE #352641
Tomoka Correctional Institution
3950 Tiger Bay Road
Daytona Beach, FL 32124

[Certificate of Service & Jurat Omitted in Printing]

Exhibit 1

FLORIDA DEPARTMENT OF CORRECTIONS
OFFENDER EMPLOYMENT ID. CARD

[DOC LOGO]

NAME: Kenneth Lynce
DC #352641
SIGNATURE: Kenneth Lynce

DOB: 11/27/58 RACE: Black SEX: Male
HEIGHT: 72" WEIGHT: 200
HAIR: Baack EYES: Brown
ISSUED: 10/01/92 LOCATION: Hendry C.I.

/s/ [Illegible]

Exhibit 2

[SEAL]

CENTRAL FLORIDA
RECEPTION CENTER

Governor
LAWTON CHILES

Secretary
HARRY K. SINGLETARY, JR.

Post Office Box 628040
Orlando, Florida 32862-8040
Telephone: (407) 282-3053
SunCom 369-1000

INMATE NAME Lynce, Kenneth DC #352641
C-207L

NOTICE TO INMATE

1993 Legislation (effective June 17, 1993), provides that all awards of administrative gain-time under s. 944.276 and provisional credits under s. 944.277 are to be canceled for all inmates serving a sentence or combined sentences in the custody of the department, or serving a state sentence in the custody of another jurisdiction. Release dates of all inmates with 1 or more days of such awards shall be extended by the length of time equal to the number of days of administrative gain-time and provisional credits which were canceled.

Based on the foregoing, your overall tentative release date has been recalculated and is 5-29-98.

7-6-93
Date of Notification

/s/ B. Bryant
Classification Specialist

The original notice should be provided to the inmate with a copy retained in the institutional file and a copy forwarded to Central Records in Admission and Release.

When I came back from court in Sept. with no time lost my date was at 11-23-98. I been Inccaratted for over a year and it is in the 8 month of 1998.

[Filed Jan. 20, 1995]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 94-891-CIV-ORL-18

KENNETH LYNCE,
Petitioner,

v.

HAMILTON MATHIS, *et al.*,
Respondents.

RESPONSE TO MAGISTRATE JUDGE'S ORDER OF JANUARY 4, 1995

Petitioner, KENNETH LYNCE, hereby responds to the Magistrate Judge's Order of January 4, 1994, requesting a statement of his position and further clarification of the issue before the Court. The Petitioner would state as follows:

1. That the Petitioner filed his Petition for Writ of Habeas Corpus on August 15, 1994, challenging the retroactive application of § 944.277(1)(i), Florida Statutes (Supp. 1992), as violative of the Ex Post Facto Clause, United States Constitution, Art. I, Sec. 10.

2. That the retroactive application of the Florida Statute revoked previously earned provisional gain time credits which caused the Petitioner to be reincarcerated on June 10, 1993. Petitioner was released from prison on October 1, 1992.

3. That since being reincarcerated, Petitioner has suffered and continues to suffer irreparable injury due to the unconstitutional action taken by the State of Florida.

4. That further review of this ex post facto claim in State Court would be futile in light of current binding Florida Supreme Court precedent. *Griffin v. Singletary*, 638 So.2d 500 (Fla. 1994).

5. That Petitioner demands the issuance of a writ of habeas corpus declaring § 944.277(1)(i), Florida Statutes (Supp. 1992) unconstitutional as applied to him and ordering his release immediately.

6. That on September 23, 1994, this Court ordered the State to file a response to the petition herein.

7. That an Order to Show Cause was issued on October 26, 1994, because the State failed to respond as directed.

8. That on November 7, 1994, the State requested an extension of time until December 7, 1994, to respond and the Court granted this request. Nothing was filed by Respondent.

9. That a status conference on January 4, 1995, provided the Respondent with the opportunity to orally express its objection to the petition, but the Respondent has yet to formally reply to the petition after the Court has given several extensions of time.

10. That the Petitioner has clearly set forth his position in his petition and demands an expedited ruling on the merits and immediately release from further imprisonment.

WHEREFORE, the Petitioner, KENNETH LYNCE, demands a writ of habeas corpus be issued for his release declaring the retroactive application of Florida Statute § 944.277(1)i) unconstitutional as violative of the Ex Post Facto Clause of Art. I Sec. 10, U.S. Constitution.

DATED this 20th day of January, 1995.

H. JAY STEVENS
Federal Public Defender

By: /s/ Joel T. Remland
JOEL T. REMLAND
Assistant Federal Public Defender
FL Bar ID No. 169291
80 N. Hughey Avenue, Suite 417
Orlando, Florida 32801-2229
Telephone: (407) 648-6338
Fax: (407) 648-6095

[Certificate of Service Omitted in Printing]

[Filed Mar. 6, 1995]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Title Omitted in Printing]

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS AND RESPONSE TO SHOW CAUSE ORDER ENTERED FEBRUARY 21

Respondent, HARRY K. SINGLETARY, JR., as Secretary of the Florida Department of Corrections, responds to this Court's order entered February 21, 1995, and answers the petition for writ of habeas corpus. For the reasons set forth below, the petition should be dismissed.

Preliminary Statement

Petitioner, Kenneth Lynce, is an inmate in the custody of the Florida Department of Corrections, presently incarcerated at Tomoka Correctional Institution, in Daytona Beach, Florida. Petitioner was first received by the department in April 1986 to serve an overall term of 22 years for attempted first degree murder, among other crimes. (Exhibit A.) Through the accumulation of gain-time and the allocation of early release credits due to prison overcrowding in the form of administrative gain-time under former Florida Statutes 944.276 (1987) (335 days credited between February 1987 and June 1988) and provisional credits under former Florida Statutes Section 944.277 (1989) (1860 days between July 1988 and January 1991), Lynce was released from custody on October 1, 1992. (Exhibit A.)

Subsequent to this release, the Attorney General of Florida issued 1992 Op. Att'y Gen. Fla. 092-96 (Decem-

ber 29, 1992), in which the Attorney General indicated that the Department of Corrections had erroneously interpreted 1992 legislative amendments to Florida Statutes Section 944.277(1)(i) that excluded from eligibility for early release due to prison overcrowding a class of offenders involving crimes of murder or attempted murder. (Exhibit A.) According to the Attorney General, the reenactment of that provision during the 1992 legislative session mandated that all previous provisional credits allocated to this class of offenders be retroactively cancelled effective July 6, 1992. (*Id.*) The Attorney General also opined that the department had the authority to return to custody any prisoner who was mistakenly released as a result of the department's erroneous interpretation. (*Id.*) Therefore, the department issued a warrant for retaking prisoner on May 3, 1993; presented the warrant to the sentencing court in the Ninth Judicial Circuit where Lynce was convicted; and received an Order for Execution of Sentence Imposed and Retaking of Prisoner on May 17, 1993. (*Id.*) Lynce was returned to custody on June 8, 1993, based upon that order. (*Id.*)

Respondent notes that after his return to custody, Lynce received a new 4½ year sentence for possession of cocaine (Exhibit A); however, because Lynce's previous 22-year term has been reinstated, it controls his release date. As of the date of the preparation of the affidavit appearing as Exhibit A, which is November 29, 1994, Petitioner's tentative release date was calculated to be May 19, 1998.

Argument

I. Exhaustion of State Court Remedies

Petitioner has filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254.

Title 28 U.S.C. § 2254 provides, in part, that

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise by any available procedure, the question presented.

28 U.S.C. § 2254(b), (c).

Principles of comity and federalism underlie the two-tier system of collateral review and the exhaustion requirement that has been codified in 28 U.S.C. § 2254 (b)-(c) (1976). *Thompson v. Wainwright*, 814 F.2d 1495, 1502 (11th Cir. 1983). A state prisoner is required to exhaust all constitutional claims within the state's judicial and administrative forums before presenting them in a federal habeas corpus proceeding. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973) (doctrine of exhaustion of state remedies as a prerequisite to federal habeas corpus action is a judicially crafted instrument); *see also Brown v. Estelle*, 530 F.2d 1280 (5th Cir. 1976); *Rose v. Lundy*, 455 U.S. 509, 522 (1982); *Ali v. The State of Florida*, 777 F.2d 1489, 1489-90 (11th Cir. 1985). The exhaustion requirement includes exhaustion of "all available state remedies," *Braden*, 410 U.S. at 491, requiring the petition to exhaust not only state judicial remedies, but also state administrative procedures.[1]

[1] Respondent advises the Court that Petitioner has both administrative and state court remedies available to resolve the issues raised in the petition. First, the Florida Department of Corrections provides a grievance procedure to inmates through which

Petitioner concedes that he has not exhausted his state court remedies. Petitioner claims that such exhaustion would be futile. Respondent would agree if the only facts and legal issues in this cause were related to the retroactive cancellation of early release credits for prisoners in custody of the department at the time of the cancellation. *See Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994); *Langley v. Singletary*, 19 Fla. L. Weekly S647 (Fla., December 8, 1994). However, Petitioner was not similarly situated to those prisoners in custody because he was released prior to the issuance of the Attorney General's opinion that indicated that the department had misinterpreted the 1992 amendments. Thus, Petitioner, unlike those petitioners whose claims were addressed by the Florida Supreme Court in *Griffin* and *Langley, supra,* may have additional claims relative to his return to custody which require specific factual determinations and interpretations of state law that have not been fully exhausted. Since Petitioner has failed to properly raise the issues presented in this proceeding in the courts of this state and since Respondent does not waive the exhaustion requirement, the petition must be dismissed. *See Thompson v. Wainwright*, 714 F.2d 1495 (11th Cir. 1983).

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issues such as those raised by Petitioner may be administratively reviewed, addressed, and corrected, if appropriate. Fla. Admin. Code Ch. 33-29. If the inmate desires further review, he may file an extraordinary writ petition with the appropriate state circuit court. Art. V, § 5, Fla. Const.; Fla.R.Civ.P. 1.630; Fla.R.App.P. 9.100. Since writs of mandamus and habeas corpus are extraordinary remedies, exhaustion of administrative remedies is generally required prior to invoking the jurisdiction of the circuit court. *See Griggs v. Wainwright*, 473 So.2d 49 (Fla. 1st DCA 1985). Review of any circuit court decision may be secured by appeal to the appropriate district court of appeal. Art. V, § 4, Fla. Const.; Fla.R.App.P. 9.110. Review of the decision of a district court of appeal by the Court of Florida is only available in limited instances. Art. V, § 3, Fla. Const.; Fla.R.App.P. 9.110; 9.120; 9.125.

II. The Ex Post Facto Claim

In the event that this Court disagrees that exhaustion is futile, Respondent addresses the sole claim raised by the Petitioner—that is, the retroactive cancellation of early release credits previously allocated amounts to an ex post facto violation of law.[2]

* * * *

The framers of the Constitution considered the ex post facto prohibition so important that it appears twice—once in Article I, Section 9, forbidding the Congress from passing any ex post facto law, and again in Article I, Section 10, placing the same limitation upon the states. Early opinions of the Supreme Court have recognized that "ex post facto law" was a term of art with an established meaning at the time of the framing of the Constitution. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (opinion of Chase, J.); *id.* at 396 (opinion of Paterson, J.). In *Calder*, the seminal case in ex post facto analysis, Justice Chase noted that:

> The prohibition, "that no state shall pass any *ex post facto* law," necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing.

Id. at 390.

While taken literally, "ex post facto" could encompass any law passed "after the fact", Justice Chase sought to clarify in *Calder* what laws, in his view, were implicated by the ex post facto clauses:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent

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[2] In addressing only the ex post facto claim, Respondent takes the position that Petitioner has waived consideration of any other claims which might be related to his return to custody. Appointed counsel has declined to file an amended petition which might include other claims, thus Petitioner is limited to the issue raised in his pro se petition.

> when done, criminal; and punishes such action. 2d. Every law that aggravates a crime or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Id. at 390.

As is apparent from this definition, the constitutional prohibition on ex post facto laws applies to penal statutes which disadvantage the offender affected by them. *Calder*, 3 U.S. (3 Dall.) at 390-392; *see also, Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). There is no doubt that one of the objectives underlying the ex post facto prohibition is to provide fair notice and to foster governmental restraint when a legislature increases punishment beyond what was prescribed when the crime was consummated. *Calder*, 3 U.S. (3 Dall.) at 387-388; *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810); *Dobbert v. Florida*, 432 U.S. 282, 298 (1977); *Weaver*, 450 U.S. at 28-29 (1981); *Miller v. Florida*, 482 U.S. 423 (1987).

However, the prohibitions of the ex post facto clauses do not extend to every change of law that "may work to the disadvantage of a defendant." *Dobbert*, 432 U.S. at 293.

> It is intended to secure "substantial personal rights" from retroactive deprivation and does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance."

Portley v. Grossman, 444 U.S. 1311, 1312 (1980).

> The critical question, as Florida has often acknowledged, is whether the new provision imposes greater

> punishment after the commission of the offense, not merely whether it increases a criminal sentence.

Weaver, 450 U.S. at 32, n. 17 (citations omitted).

> The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.

Paschal v. Wainwright, 738 F.2d 1173, 1176, n.4 (11th Cir. 1984), citing *United States v. Lovett*, 328 U.S. 303, 324 (1946).

The underlying purpose of the statutes now under ex post facto scrutiny is of critical importance in determining whether a statute is procedural or substantive, or indeed properly the subject of ex post facto analysis. Administrative gaintime and provisional credits were no more than mechanisms for reducing the prison population for the administrative convenience of the Department of Corrections—these statutes do not address the substantive matters concerning punishment or reward. *See Blankenship v. Dugger*, 521 So. 2d at 1098; *Dugger*, 584 So. 2d at 2.

Like the term "ex post facto", the term "procedural" requires some explanation. While the earlier decisions of the United States Supreme Court describing "procedural" changes have not explicitly defined what is meant by the term, the Supreme Court has recently expounded upon and limited the scope of the definition in *Collins v. Youngblood*, 497 U.S. 37 (1990).[3]

In *Youngblood*, the Supreme Court acknowledged that previous decisions of the court held that:

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[3] In declining to expand the scope of the ex post facto clauses, the Supreme Court has receded from its earlier decisions in *Kring v. Missouri*, 107 U.S. 221 (1883) and *Thompson v. Utah*, 170 U.S. 343 (1898).

> [A] procedural change may constitute an ex post facto violation if it 'affect[s] matters of substance,' *Beazell, supra,* at 171, 70 L.Ed 216, 46 S.Ct. 68, by depriving a defendant of 'substantial protections with which the existing law surrounds the person accused of crime,' *Duncan v. Missouri,* 152 U.S. 377, 382-283, 38 L.Ed. 485, 14 S.Ct.570 (1894), or arbitrarily infringing upon 'substantial personal rights.' *Malloy v. South Carolina,* 237 U.S. 180, 183, 59 L.Ed. 905, 35 S.Ct. 507 (1915); *Beazell, supra,* at 171, 70 L.Ed 216, 46 S.Ct. 68.

Youngblood, 497 U.S. at 45.

However, the *Youngblood* court went on to hold that "the references in *Duncan* and *Malloy* to 'substantial protections' and 'personal rights' should not be read to adopt without explanation an undefined enlargement of the Ex Post Facto Clause." *Youngblood,* 497 U.S. at 46.

In announcing its decision in *Youngblood*, the Supreme Court specifically receded from its earlier decision in *Kring v. Missouri,* 107 U.S. 221 (1883):

> The Court's departure [in *Kring*] from Calder's explanation of the original understanding of the Ex Post Facto Clause was, we think, unjustified.

Youngblood, 497 U.S. at 49.

In *Kring,* the Supreme Court had defined an ex post facto law as:

> [O]ne which, in its operation, makes that criminal which was not so at the time the action was performed; *or which increases the punishment, or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage.*

Kring, 107 U.S. at 228-229 (quoting *United States v. Hall,* 26 F.Case 84 86 (No. 15,285) (D. Pa. 1809) (emphasis added).

The Supreme Court has now made clear that shifting the focus of ex post facto analysis from the original understanding of the ex post facto clause is impermissible and that the language cited in *Kring* was never intended "to mean that the Constitution prohibits retrospective laws, other than those encompassed by the Calder categories, which 'alter the situation of a party to his disadvantage.' " *Youngblood,* 491 U.S. at 49-50.

> The holding in Kring can only be justified if the Ex Post Facto Clause is thought to include not merely the Calder categories, but any change which "alters the situation of a party to his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases. We accordingly overrule Kring.

Id. at 50.

Similarly, in receding from its decision in *Thompson v. Utah,* 170 U.S. 343 (1898), the Supreme Court noted:

> The right to jury trial provided by the Sixth Amendment is obviously a "substantial" one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the Ex Post Facto Clause. To the extent that Thompson v. Utah rested on the Ex Post Facto Clause and not the Sixth Amendment, we overrule it.

Youngblood, 497 U.S. at 51-52 (Stevens, Brennan, and Marshall, concurring).

Petitioner contends that his later exclusion from early release eligibility through retroactive cancellation of his credits is ex post facto merely because he will be required to serve a longer portion of his sentence. Under *Youngblood,* the question of whether a prisoner is disadvantaged by being required to serve most if not all of his original sentence falls short of providing a full answer

when conducting an ex post facto analysis. The fact that Petitioner may feel disadvantaged by being excluded from early release prompted by prison overcrowding, when considered alone, is insufficient to trigger the prohibitions of the ex post facto clause. Petitioner must also show that the State's procedural mechanism to relieve prison overcrowding through early release credits creates a "*substantial personal right*" *related to the definition of crimes, defenses, or punishments.* Obviously, these statutes do not retroactively create new criminal offenses nor do they deprive a defendant of defenses. Thus the sole question is whether Florida's early release statutes "change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime when committed." *Calder v. Bull,* 3 U.S. (3 Dall.) at 390.

The Supreme Court has also given guidance in determining whether a statute is punitive or penal in nature. In *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-69 (1963), the Court described the standards traditionally applied to determine whether a statute is punitive or penal in nature:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id. (citations omitted).

The underlying purpose of the early release statutes thus becomes of critical importance in determining whether the statutes are procedural or substantive in nature, or

whether they operate to increase the "quantum of punishment" merely because they afford early release from a sentence already imposed. There can be no dispute that the *sole* purpose of the early release statutes is to provide a mechanism to alleviate prison overcrowding. The statutes were not designed nor enacted to promote the traditional aims of punishment—that is, retribution and deterrence. The statutes were enacted to address the singular problem of overcrowding—they were never intended to operate as an incentive to reduced imprisonment or to become a consideration in the sentencing forum.

Petitioner apparently believes that early release credits are the equivalent to the basic gaintime addressed in *Weaver v. Graham,* 450 U.S. at 24 and the incentive gaintime addressed in *Raske v. Martinez,* 876 F.2d 1496 (11th Cir. 1989) and *Waldrup v. Dugger,* 562 So. 2d 687 (Fla. 1990). However, the similarities are limited to the nomenclature. Both basic and incentive gaintime relate to the sentence imposed, and a release date reduced by these awards can be reasonably predicted, based upon length of the term meted out. Basic gaintime is applied as a lump sum award to reduce the overall length of sentence the day the prisoner enters the prison gates. While not necessarily a part of the sentence in a technical sense, the award of basic gaintime is ar quantifiable determinant of a prisoner's overall term, which, as the Supreme Court recognized in *Weaver,* may operate as a "factor . . . [in] the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." Similarly, the potential to earn incentive gaintime for labor performed and constructive activities, although contingent upon performance and good behavior, is also quantifiable based upon length of sentence imposed. Thus, to the extent that these two types of "gaintime" operate in tandem with the length of sentences imposed, they affect the "quantum of punishment" which attaches at the time the crime is committed. Conversely, the eligibility and receipt by a prisoner of early release awards, whether those

awards are called "gaintime", "credits", "allotments", etc., is in no way tied to overall length of sentence. The need for and application of such awards are contingent upon many outside variables which contribute to prison overcrowding. There is no relationship to the original penalty assigned to the crime at the time it was committed nor to the ultimate punishment meted out.[4] The sole purpose of the early release statutes is to provide a temporary mechanism to alleviate the administrative crisis created by prison overcrowding while continuing to protect the public from violent offenders. The statutes are procedural in nature—their purpose directed to alleviating the administrative crisis of prison overcrowding not to the traditional purposes of punishment. Consequently, Florida's early release statutes create no "substantial personal rights" relating directly to the definition of crimes, defenses, or punishments, as defined and limited by the Supreme Court's decision in *Youngblood*.

It is most important to note that the Eleventh Circuit Court of Appeals as well as the various federal district courts in Florida, have concurred with the decisions of the Florida Supreme Court in *Blankenship* and *Rodrick, supra*, in its holdings that these statutes are administrative and procedural in nature and not subject to ex post facto proscriptions.[5] More recently, this Court has addressed

[4] The Florida Supreme Court has recently made clear in the sentencing context that early release credits are not a valid consideration in the sentencing process. *See Griffin v. Singletary*, 19 Fla. L. Weekly S273 (Fla. May 19, 1994) (original opinion 19 Fla. L. Weekly S94a, February 24, 1994) (provisional [credits] in no sense [are] tied to any aspect of the original sentence and cannot possible be a factor at sentencing or in deciding to enter into a plea bargain); *Tripp v. State*, 622 So. 2d 941 (1993) (the trial court may not direct credit for administrative gaintime or provisional credits on a prior probationary split sentence or a sentence structure affected by the *Tripp* decision).

[5] *See Petrone v. Dugger*, Case No. 88-12041-Civ-Atkins, USDC-Southern District, entered August 8, 1988, *aff'd* Case No. 88-6061 (11th Cir., August 29, 1989); *see also Manzanero v. Dugger*, Case

the specific issue at bar here—that is, the retroactive cancellation of provisional credits and administrative gaintime previously allocated to alleviate prison overcrowding. The decision in *Joseph C. Magnotti v. Harry K. Singletary*, Case No. 93-8554-Civ-Moreno, USDC—Southern District, rendered on March 24, 1994, cites with approval the recent decision of the Florida Supreme Court in this case: *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994). *Griffin*, like the predecessor decisions in *Rodrick, Grant*, and *Blankenship, supra*, makes clear that the "Florida Legislature did not intend to confer an expectation upon Florida Inmates such as the petitioner that early release credits would continue to be applied to shorten their sentences . . .[t]he provisional credits in § 944.277 were contemplated not as a prisoner entitlement but merely as an escape valve which would be triggered only by the need to alleviate overcrowding in the state prison system." *Magnotti* at 6. Ultimately, this Court has concluded that the retroactive cancellation of early release credits allocated specifically for the purpose of alleviating prison overcrowding does not offend the due process, equal protection, or ex post facto clauses of the Constitution.

Recently, the Eleventh Circuit has held that Florida's control release statute, Section 947.146, Florida Statutes,

No. 88-6076-Civ-Scott, USDC-Southern District, judgment entered September 29, 1988; *Aman v. Martinez*, Case No. 88-50124-RV, USDC-Northern District, judgment entered May 8, 1989; *Stafford v. Dugger*, Case No. 89-295-Civ-J-16, USDC-Middle District, judgment entered July 10, 1990; *Tommy Williams, Sr. v. Dugger*, Case No. 90-602-Civ-T-3A98(A), USDC-Middle District, judgment entered June 7, 1991; *Edgar Searcy v. Singletary*, Case No. 91-1071-Civ-T-23C, USDC-Middle District, report and recommendation entered August 31, 1993.

It is especially important to note that Circuit Judge Tjoflat, who authored the opinion in *Raske* in July 1989, was also a member of the panel who entered the decision in *Petrone*, just one month later in August 1989. Thus, it is clear that the federal appellate court considered the two decisions distinguishable.

does not affect punishment and therefore does not violate the ex post facto clause. *Hock v. Singletary,* 8 Fla. L. Weekly Fed. C943 (11th Cir., January 9, 1995). While *Hock* dealt with the eligibility of an inmate for the control release program due to the nature of his offense, the Eleventh Circuit clearly addressed the nature of early release credits in finding that early release statutes are "procedural in nature and are not directed toward the traditional purposes of punishment." *Id.* (citing *Dugger v. Rodrick,* 584 So. 2d 2, 4 (Fla. 1991)).

For the reasons cited above, Respondent submits that the repeal of the early release statutes and simultaneous cancellation of all early release balances do not violate the prohibition against ex post facto laws. The petition must therefore be denied.

III. Response to Court's Order to Show Cause of February 21

The Court entered an order on February 21, 1995, giving Respondent eleven days to respond to the order to show cause stating why the relief requested in the petition should not be granted and why sanctions should not be imposed for failure to respond timely.

First, undersigned counsel does not recollect that a time frame for response by the Respondent was determined at the hearing on January 4. Rather, undersigned counsel recollects and her notes reflect that counsel for the petitioner was given until the end of January to file an amended petition if he so desired. No written order reflecting any ruling of the Court was entered to counsel's knowledge after the hearing on January 4. Apparently, undersigned counsel has incorrectly recollected the rulings at hearing.

As explained at hearing on January 4, counsel did not earlier file a written response because of the appointment of counsel by the Court and the anticipation of an

amended petition by appointed counsel in substitution for the pro se petition by inmate Lynce.[6] The Court acknowledged at hearing that the legal arguments of the Florida Department of Corrections were known since the department had previously filed a substantive response in the case of Barr v. Singletary, Case No. 93-667-Civ-Orl-22 and in the companion case at hearing on January 4, Darryl v. Singletary. As pointed out by counsel for Respondent, the arguments relative to the ex post facto issues were the same for all cases; however, counsel for Respondent also pointed out that Petitioner Lynce's case differed in that he was a former prisoner returned to custody as a result of the department's misinterpretation of 1992 legislative amendments to Florida Statutes Section 944.277. *See* 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992). Instead of amending the petition, appointed counsel filed a response simply claiming that since no response had been filed by the Respondent, Petitioner was entitled to an expedited ruling on the merits. In the absence of a response, petitioner would be entitled to a ruling on the merits; he is not entitled to a grant of the petition by default. *See, e.g., Bermudez v. Reid,* 733 F.2d 18, 21 (2d Cir. 1984). If courts were to "enter default judgments without reaching the merits of the claim, it would be not the defaulting party but the public at large that would be made to suffer . . . ." *Id.; see also, Aziz v. Leferve,* 830 F.2d 184, 187 (11th Cir. 1987) (default judgment not contemplated in habeas corpus cases); *Stines v. Martin,* 849 F.2d 1323 (10th Cir. 1988).

A request for dismissal based upon exhaustion questions along with a substantive response to the ex post facto claim have been filed. Under the circumstances outlined above, undersigned counsel does not believe that

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[6] Prior to the appointment of counsel, undersigned counsel requested an extension of time when paperwork related to this case was forwarded to her in early November by the Office of Attorney General.

sanctionable conduct has occurred. Accordingly, she respectfully requests that the response be accepted and the show cause order be discharged.

Respectfully submitted,

/s/ Susan A. Maher
SUSAN A. MAHER
Deputy General Counsel
Florida Bar No. 0438359
Department of Corrections
2601 Blairstone Road
Tallahassee, Florida 32399-2500
(904) 488-2326

[Certificate of Service Omitted in Printing]

EXHIBIT A

[DoC Logo]

FLORIDA
DEPARTMENT OF
CORRECTIONS

Governor
LAWTON CHILES

Secretary
HARRY K. SINGLETARY, JR.

An Affirmative Action/
Equal Opportunity Employer

2601 Blair Stone Road • Tallahassee, FL 32399-2500

AFFIDAVIT

COUNTY OF LEON

Personally appeared before me this day Bobbie Glover, who being duly sworn deposes and says that:

She is the Bureau Chief of Admission and Release of the Department of Corrections and as such Bureau Chief she is the official custodian of all inmate records pertaining thereto:

Kenneth Lynce, DC #352641, a/k/a Kenneth Russell Lynce was received by the Florida Department of Corrections on April 23, 1986, having been sentenced in the Circuit Court of Orange County, for the following:

Case Number:	CR85-3760, imposed January 27, 1986
Term:	Three and one-half (3½) years less credit for 44 days time served prior to sentencing, to run concurrent with case number CR85-5152.
Offense:	Delivery of Cocaine a Controlled Substance
Case Number:	CR85-5152, two counts, imposed January 27, 1986
Term:	Three and one-half (3½) years less 29 days credit for time served prior to sentencing as to each count; each count to run concurrent to the other and concurrent with case number CR85-3760.

Offense: Count One—Delivery of Cocaine a Controlled Substance
Count Two—Possession of Cocaine a Controlled Substance

Case Number: CR85-6173, three counts, imposed April 14, 1986

Term: Twenty-two (22) years less credit for 170 days time served prior to sentencing; each count concurrent to the other and concurrent to case numbers CR85-5152 and CR85-3760.

Offense: Count Two—Armed Burglary of Dwelling
Count Three—Attempted First Degree Murder
Count Four—Possession of a Firearm in Commission of a Felony

Through the accumulation of gain-time as provided for in Florida Statute 944.275 as well as the application of 335 days of administrative gain-time (credited between February 1987 and June 1988) and 1,860 days of provisional credits (credited between July 1988 and January 1991), inmate Lynce was released from custody on October 1, 1992, as his release date was calculated as follows based on the sentence imposed in case number CR85-6173:

DATE SENTENCE BEGAN		04-14-1986
Twenty-two (22) Years in Days:	+	8030
Jail Credits:	—	170
MAXIMUM RELEASE DATE		10-21-2007
Basic Gain-time Awarded Pursuant to Section 944.275, Florida Statutes:	—	2640
Additional Gain-time Awarded:	—	958
Administrative Gain-time Awarded Pursuant to Section 944.276, Florida Statutes:	—	335
Gain-time Forfeited Due to Disciplinary Action:	+	295
TENTATIVE RELEASE DATE		11-04-1997
Provisional Credits Awarded Pursuant to Section 944.277, Florida Statutes:	—	1860
PROVISIONAL RELEASE DATE		10-01-1992

Subsequent to this release, Attorney General Opinion 92-96, dated December 29, 1992, and clarified on December 31, 1992, was issued indicating the method of release date calculation utilized by the Department was in error due to legislative action amending section 944.277, effective July 6, 1992, which authorized the retroactive cancellation of credits previously awarded to inmates now excluded by subsection 944.277(1)(i). Pursuant to that opinion and its clarification, the department recalculated inmate Lynce's release date cancelling all provisional credits (1,860 days) previously awarded and issued an *Affidavit for Retaking Prisoner* on May 3, 1993. This affidavit was presented to the sentencing court in the Ninth Judicial Circuit in and for Orange County, Florida which sentenced inmate Lynce in case number CR85-6173, count three. The sentencing court issued an *Order for Execution of Sentence Imposed and Retaking of Prisoner* on May 17, 1993. Inmate Lynce was returned to the Department's custody on June 8, 1993, based on the May 17, 1993 order.

On July 5, 1993, inmate Lynce was release to the custody of Orange County officials for an outside court appearance.

Inmate Lynce was returned to the Department's custody on September 21, 1993, after sentencing in the Circuit Court of Orange County on July 7, 1993, for the following:

Case Number: CR92-12809

Term: Four and one-half (4½) years less credit for 39 days time served prior to sentencing to run concurrent with any active sentence.

Offense: Count Two—Possession of Cocaine

As a result of new legislation effective June 17, 1993, (Section 944.278), all administrative gain-time (335 days) previously awarded inmate Lynce under Section 944.276, Florida Statutes was also cancelled.

Inmate Lynce's maximum and tentative release dates are currently calculated based on the sentence imposed in case number CR85-6173, as follows:

DATE SENTENCE BEGAN		04/14/1986
Twenty-two (22) Year Sentence in Days:	+	8030
Jail Credits:	–	170
MAXIMUM RELEASE DATE		10/21/2007
Basic Gain-time Awarded Pursuant to Section 944.275, Florida Statutes:	–	2640
Additional Gain-time Awarded:	–	1157
Administrative Gain-time Awarded Pursuant to Section 944.276, Florida Statutes:	–	335
Administrative Gain-time Cancelled Pursuant to Section 944.278, Florida Statutes:	+	335
Gain-time Forfeited Due to Disciplinary Action:	+	355
TENTATIVE RELEASE DATE		05/19/1998
Provisional Credits Awarded Pursuant to Section 944.277, Florida Statutes:	–	1360
Provisional Credits Cancelled Pursuant to Opinion 92-96, Attorney General:	+	1360
RE-ESTABLISHED TENTATIVE RELEASE DATE:		05/19/1998

The facts stated in the foregoing affidavit are based on information contained in the official files of the Department of Corrections.

/s/ Bobbie Glover
BOBBIE GLOVER
Bureau Chief
Admission and Release Authority
Department of Corrections

[Jurat Omitted in Printing]

[Filed Mar. 14, 1995]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Title Omitted in Printing]

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

I. Status

Petitioner initiated this action for habeas corpus relief pursuant to 28 U.S.C. § 2254 on August 18, 1994 (Doc. No. 1). Upon consideration of the petition, the Court ordered Respondents to show cause why the relief sought in the petition should not be granted. Respondents filed a reply to the petition in accordance with the Court's instructions and Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (Doc. No. 22, filed March 6, 1995). Petitioner alleged only one claim for relief, that the State's retroactive application of its provisional release credits statute was an *ex post facto* law in violation of Article I, Section 10 of the United States Constitution.

II. Factual Background

Petitioner was convicted of attempted first-degree murder, armed burglary, and possession of a firearm in the commission of a felony on April 14, 1986. He was sentenced to a term of twenty two years imprisonment. Under the State's provisional release credit statute in force at that time, he was eligible to accumulate credits to shorten

his period of incarceration. Fla. Stat. ch. 944.277 (1989). The provisional credits were only to be awarded during periods when the prisoner population of the correctional system approached full capacity, and then only to inmates not convicted of certain enumerated offenses or serving a mandatory minimum sentence. Fla. Stat. ch. 944.277(1) (1989).

From the time of his sentencing to January 1991, Petitioner accumulated 1860 days of provisional release credits. During the 1992 session, the Florida Legislature amended the provisional release credit statute to exclude the award of credits to prisoners convicted of attempted murder. Fla.Stat. ch. 944.277(1) (1992 Supp.). Petitioner's provisional release date, hastened by the 1860 days of credit previously awarded, was therefore set at October 1, 1992. On that date, Petitioner was released from custody.

On December 29, 1992, Robert Butterworth, Attorney General of the State of Florida, issued an opinion interpreting the 1992 amendment of Fla.Stat. ch. 944.277. 92 Op. Att'y Gen. 96 (1992). He found that the provisional release credit statute was adopted as a permissive administrative means for relieving prison overcrowding. He also found that a footnote which had restricted previous amendments to Fla.Stat. ch. 944.277 to prospective effect was not included in the 1992 amendment. He therefore concluded that the 1992 amendment was intended to have retroactive effect, which he believed precluded the award of any provisional release credits to a prisoner convicted of murder.

Harry Singletary, Jr., Secretary of the Florida Department of Corrections, solicited a further opinion from the Attorney General on the interpretation of the amended provisional release statute. On December 31, 1992, the Attorney General clarified his previous opinion and suggested that provisional release credits awarded before the

1992 amendment of Fla.Stat. ch. 944.277 to inmates convicted of murder should be withdrawn. He also found that, while no court decision compelled the Department of Corrections to recommit previously released prisoners, the department could do so at its own discretion.

Petitioner's provisional release credits were cancelled on January 4, 1993. The Department of Corrections submitted an Affidavit for Retaking Prisoner to the Ninth Judicial Circuit Court on May 3, 1993. On May 17, 1993, the Court issued an Order for Execution of Sentence Imposed and Retaking of Prisoner. Petitioner was returned to incarceration on June 8, 1993. His prior release date of October 1, 1992 was cancelled and his tentative release date was delayed until May 19, 1998.

III. Findings of Fact and Conclusions of Law

Petitioner contends that the cancellation of his accumulated provisional release credits pursuant to the 1992 amendment of Fla.Stat. ch. 944.277, which caused a significant delay in his tentative release date, is an *ex post facto* law in violation of Article I, Section 10 of the United States Constitution. Respondents contend that provisional release credits were an administrative tool to reduce prison overcrowding, not a mitigation of punishment. They also contend that the statute was merely procedural and therefore did not affect the magnitude of punishment imposed for conviction of an offense.

Article I, Section 10 of the United States Constitution states, "No State shall . . . pass any . . . ex post facto Law." U.S. Const. art. I, § 10, cl. 1. The Framers intended the *ex post facto* clause to be a safeguard for the public which would force criminal legislation to provide fair warning of its effects and permit reliance until explicitly changed. *Weaver v. Graham*, 450 U.S. 24, 28 (1981). The prohibition extends to any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes addi-

tional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. at 28 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1867)). Two elements are required for a criminal or penal law to be considered *ex post facto*: it must apply to events occurring before its enactment and it must disadvantage the offender it affects. *Id.* at 29; *Lindsay v. Washington*, 301 U.S. 397, 401 (1937). However, legislation which satisfied both requirements would not violate the *ex post facto* prohibition if the change it effected were merely procedural and did "not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Hopt v. Utah*, 110 U.S. 574, 590 (1884); *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

In *Weaver v. Graham*, 450 U.S. 24, 67 L.Ed.2d 17 (1981), the Supreme Court held unconstitutional the application of the amended Florida good time gain-time statute to inmates convicted before the effective date of the statute. The amendment decreased the number of days of gain-time that an inmate could earn per month for good behavior. *See* Fla.Stat. ch. 944.27(1) (1975), Fla.Stat. ch. 944.275(1) (1979). Although previously awarded gain-time was not cancelled or reduced, the new gain-time statute was applied to all inmates in the prison system, including those convicted before the enactment of the amendment. The State of Florida advanced three arguments suggesting that the law was not *ex post facto*: first, it did not impair vested rights; second, on its face, it applied only prospectively; and third, it did not worsen the conditions of incarceration.

The Court rejected the first argument out of hand; vested rights have never been a requirement for protection under the *ex post facto* clause, only under the contracts clause and the due process clause. *Weaver*, 450 U.S. at 29. As to the second argument, even though the amendment was prospective in form, it was retrospective in effect. "The critical question is whether the law

changes the legal consequences of acts completed before its effective date." *Id.* at 31. Prisoners incarcerated for previous conduct would have greater consequences attached to those prior acts, and the law was therefore retrospective. The application to earlier offenders was repugnant to the original meaning of the *ex post facto* clause because an inmate who considered gain-time before entering a guilty plea would have calculated and relied upon a shorter sentence under the then existing statute. *Id.* at 32. Finally, the Court addressed whether the amendment placed the prisoner in a worse position than the prior law. Because a prisoner had less opportunity to shorten his sentence, he would have been materially harmed by the change. *Id.* at 33. The Court did not consider Florida's argument that the alteration was merely procedural, for it substantively changed the gain-time available, not merely the method by which it was assigned.

The Eleventh Circuit turned to the issue of gain-time after Florida again altered the formula for its award. In *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989), the Court held unconstitutional a decrease of the opportunity to earn incentive gain-time. The amended statute provided for increased good behavior gain-time but decreased the amount of incentive gain-time that could be earned by diligent labor. *See* Fla.Stat. 944.275 (1982), Fla.Stat. ch. 944.275 (1983). The net effect for an inmate who labored diligently was a decrease in available gain-time. The State of Florida made three closely related arguments as to why the statute was not *ex post facto*: first, the granting of incentive gain-time was discretionary, while the granting of good behavior gain-time was automatic; second, the granting of incentive gain-time was discretionary because the duties which allowed an inmate to earn it were a matter of legislative grace; and third, the increase in good behavior gain-time offset the decrease in incentive gain-time.

The Court found that although an inmate had no *right* to gain-time, either good behavior or incentive, the *ex post facto* clause has never required a vested right to be impaired to violate the clause. *Raske*, 876 F.2d at 1499 n.5. In fact, the Court found that both incentive gain-time and good behavior gain-time, which was held subject to the prohibition in *Weaver*, were discretionary. *Id.* Not only did the State have discretion in determining whether good behavior or incentive gain-time would be awarded, it used similar criteria in making the decision. There was therefore no distinction between the two insofar as the *ex post facto* clause was concerned, so the reasoning of *Weaver* applied to incentive gain-time. *Id.* While the work an inmate performed to earn incentive gain-time may have been a matter of legislative grace, if the State afforded the inmate the opportunity to work, it was bound to reward the prisoner for his services with at least as much gain-time as he would have earned at the time of his offense. *Id.* at 1500. Finally, although an inmate might not earn the maximum award of incentive gain-time (and was eligible to earn more good behavior gain-time under the new statute), the denial of the opportunity to do so made the punishment for the prisoner's offense more onerous than when the offense was committed.

In *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), the Eleventh Circuit addressed the 1989 amendment of Florida's control release statute, Fla.Stat. ch. 947.146 (1989). The goal of the control release program, like that of provisional release credits, was to ease the overcrowding of the state correctional system. The 1989 amendment of the control release statute transferred responsibility for control of the prison population from the Florida Department of Corrections to the Florida Parole Commission and altered prisoner eligibility. Prior to the amendment, prisoners convicted of murder were eligible for control release; after the amendment, they were not.

The Court, reasoning in summary fashion, found that "any disadvantage suffered by the petitioner does not affect punishment and therefore does not violate the Ex Post Facto Clause." *Hock*, 41 F.3d at 1472. In contrast with the alterations in the good behavior gain-time statutes which had been held unconstitutional in *Weaver* and *Raske*, it found that the control release statute was procedural, not substantive. *Id.* The Court agreed with the Florida Supreme Court's interpretation of the *ex post facto* clause, in which it had earlier held that Fla.Stat. ch. 944.277 "was procedural in nature, [and] not directed toward the traditional purposes of punishment." *Dugger v. Roderick*, 584 So.2d 2 (Fla. 1991), *cert. denied sub nom. Roderick v. Singletary*, ——U.S.——, 116 L.Ed.2d 790 (1992). It therefore held that retroactive application of the amendment did not run afoul of the *ex post facto* clause.

The Eleventh Circuit then stated that the amendment to the control release statute, unlike changes in good behavior and incentive gain-time statutes, did not deny inmates the ability to reduce their terms of confinement. *Hock*, 41 F.3d at 1472. The control release statute permitted release based upon prison system overcrowding, not diligent inmate labor and good behavior. The former was independent of an prisoner's labors, the latter the fruit of it. The Court also held that good behavior gain time could be predicted and accounted for in entering into a plea bargain and sentencing but control release could not. *Id.* at 1473.

Although the Eleventh Circuit's opinion is sparsely reasoned, it resolves the issues at question. Provisional release credits were merely an earlier alternative to control release as a means to relieve prison overcrowding. In fact, *Roderick*, the Florida case upon which the Eleventh Circuit relies heavily, dealt with provisional release credits, not control release. Therefore, in all likelihood, were the Eleventh Circuit to have faced the issue of provisional release credits under Fla.Stat. ch. 944.277

instead of the control release statute, it would have held the 1992 amendment not to violate the *ex post facto* clause. Accordingly, the undersigned respectfully recommends that the Petition for Writ of Habeas Corpus filed herein be DENIED and that the case be DISMISSED with prejudice.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Orlando, Florida on March 14, 1995.

/s/ David A. Baker
DAVID A. BAKER
United States Magistrate Judge

[Filed Apr. 24, 1995]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Title Omitted in Printing]

PETITIONER'S OBJECTION TO REPORT AND RECOMMENDATION

The Petitioner, KENNETH LYNCE, hereby objects to the Report and Recommendation of the United States Magistrate Judge filed on March 14, 1995.

Status

Petitioner filed this habeas corpus action, pursuant to 28 U.S.C. § 2254, on August 18, 1994. Respondents filed their reply on March 6, 1995. The sole claim for relief is based on the State's retroactive application of its provisional release credits statute. § 944.277, Fla.Stat. (1991). On March 14, 1995, the United States Magistrate Judge filed a Report and Recommendation which recommended the Petition be denied and the case be dismissed with prejudice.

Objections

The Report and Recommendation primarily relies on *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995). In that case, the Eleventh Circuit held the control release statute, § 947.146 Fla.Stat. (1993), was "procedural" and therefore did not affect the amount of punishment imposed, thus no Ex Post Facto Clause violation existed. This reasoning was taken from the Florida Supreme Court's opinion in *Dugger v. Rodrick*, 584 So.2d 4 (Fla.

1991) and adopted by *Hock*. The Petitioner submits *Hock* was wrongly decided and objects to the Report and Recommendation since it rests upon that foundation.

The Report and Recommendation relied on *Hock*, which erroneously concluded any disadvantage suffered by the Petitioner in that case, did not affect punishment. Petitioner contends that his sentence was significantly *increased* by the loss of accumulated provisional release credits. Specifically, he was released on October 1992 by getting credit for 1860 days of provisional release credits. After his release, a reinterpretation of Fla.Stat. § 944.277, provided for retroactive application and cancellation of his previously earned release credits. Thus, on June 8, 1993, he was rearrested and returned to prison with a new tentative release date of May 19, 1998. His sentence of imprisonment was lengthened by an additional five years. Certainly, this increase in sentence appears to be an increase in punishment, not a mere "procedural" change but one of great substance causing tremendous suffering to Petitioner.

Contrary to the conclusory opinion of *Hock*, an inmate does have a reasonable expectation he will become eligible for provisional release credits due to a change in the population level at prison. *Id. at 1472*. Typically, at plea bargaining, clients are advised that due to overcrowding they will be released much earlier and rely on this advice in entering their pleas and at sentencing.

For *ex post facto* purposes, early release in Florida affects substantive matters of punishment and is just as much a part of the penalty structure as the basic gaintime at issue in *Weaver v. Graham*, 450 U.S. 24 (1981) and *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989); as well as the sentencing guidelines at issue in *Miller v. Florida*, 482 U.S. 423 (1987). These sentencing procedures were designed to address overcrowding and to maximize the duration of incarceration consistent with limited correctional resources.

In addition, the *Hock* case is distinguishable from the Petitioner's case. First, *Hock* deals with control release, a discretionary program, which provides for parole-like release. The statute provides that "no inmate has a right to control release" and sets forth numerous eligibility factors that are irrelevant to provisional release credits. § 947.146(2); (6), Fla. Stat. (1993). In contrast, the Petitioner had an unqualified right to be released on his provisional release date. § 944.277(5), Fla.Stat. (1991). Control release was not in effect at the time Petitioner committed his offense and he makes no claim regarding it. Also *Hock* addresses eligibility to receive control release credits, not cancellation of previously granted provisional release credits, fully quantified and predictable. *Id. at 1472-73*. Finally, eligibility for and cancellation of provisional release credits directly affects the severity of punishment herein.

Clearly, the revocation of previously earned provisional release credits was an *ex post facto* violation of the U.S. and Florida Constitution. Based on the holding in *Weaver* and *Raske*, the Petitioner is entitled to relief.

Accordingly, the Petitioner objects to the Report and Recommendation in the instant case.

DATED this 24th day of April, 1995.

/s/ Joel T. Remland
JOEL T. REMLAND
Assistant Federal Public Defender
FL Bar ID No. 169291
80 N. Hughey Avenue, Suite 417
Orlando, Florida 32801-2229
Telephone: (407) 648-6338
Fax: (407) 648-6095

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Docket Number 94-891-Civ-Orl-18

KENNETH LYNCE

v.

HAMILTON MATHIS, *et al*

Judge G. Kendall Sharp

JUDGMENT IN A CIVIL CASE

☒ Decision by Court. This action came before the Court with the judge named above presiding and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Petitioner, Kenneth Lynce take nothing and the action be dismissed.

Clerk
DAVID L. EDWARDS

(By) Deputy Clerk
/s/ John McClung

Date May 10, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Title Omitted in Printing]

ORDER

Petitioner's Request for A Certificate of Probable Cause (Doc. No. 28, filed June 8, 1995) is DENIED. Petitioner has not made a colorable showing of the deprivation of any federal constitutional right.

DONE AND ORDERED in Chambers at Orlando, Florida, this 16 day of June, 1995.

/s/ G. Kendall Sharp
G. KENDALL SHARP
United States District Judge

[Filed Oct. 16, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-2773

KENNETH LYNCE,
Petitioner-Appellant,

versus

HAMILTON MATHIS, Superintendent; ROBERT A. BUTTERWORTH, Attorney General of the State of Florida; HARRY K. SINGLETARY, JR., as Secretary of the Florida Department of Corrections,
Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Appellant's application for a certificate of probable cause is DENIED.

/s/ J. L. Edmondson
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

No. 95-7452

KENNETH LYNCE,
Petitioner

v.

HAMILTON MATHIS, Superintendent, Tomoka Correctional Institution, *et al.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

May 13, 1996

(5)

No. 95-7452

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KENNETH LYNCE,
Petitioner,

v.

HAMILTON MATHIS, ROBERT BUTTERWORTH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF PETITIONER

Of Counsel:

CARTER G. PHILLIPS
PAUL A. HEMMERSBAUGH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

H. JAY STEVENS
JOEL T. REMLAND *
Federal Public Defender
Middle District of Florida
80 N. Hughey Avenue
Suite 417
Orlando, FL 32801
(407) 648-6338

Counsel for Petitioner

* Counsel of Record

July 12, 1996

58 pp

QUESTION PRESENTED

Whether the retroactive application of amended Florida penal statute § 944.277 (1992) violates the Ex Post Facto Clause of the United States Constitution by withdrawing early release credits previously awarded to petitioner under the pre-amendment version of the statute, where that withdrawal was based solely upon petitioner's 1985 offense of conviction.

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IN THE

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KENNETH LYNCE,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF PETITIONER

OPINIONS BELOW

The order of the court of appeals denying petitioner's Application for a Certificate of Probable Cause (J.A. 66) is unreported. The orders of the district court denying petitioner's Petition for Writ of Habeas Corpus and Application for a Certificate of Probable Cause (J.A. 64, 65) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1995. J.A. 66. The petition for writ of certiorari was filed on January 10, 1996 and was granted on May 13, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Ex Post Facto Clause of the United States Constitution, Article I, Section 10, clause 1, provides in pertinent part: "No State shall . . . pass any . . . ex post facto law . . . ."

2. The provisions of § 944.277, Fla. Stat. (Supp. 1992) are set out in Appendix A. The provisions of §§ 921.001, 944.275, 944.276, 944.277, 944.278, and 944.598, Fla. Stat., in all of their relevant versions, as well as § 775.082, Fla. Stat. (1985) and Fla. R. Crim. P. 3.701 (1985), are lodged under separate cover with the Court.

STATEMENT OF THE CASE

1. On April 14, 1986, petitioner Kenneth Lynce pleaded *nolo contendere* to attempted first degree murder and other offenses and was sentenced to 22 years in Florida state prison. J.A. 3, 33, 53.[1]

Between 1983 and 1993, Florida statutes authorized the Florida Department of Corrections to make overcrowding "early release" credits available to eligible inmates upon an executive finding that the prisons had reached a specified percentage of lawful capacity. *See*

[1] The crimes occurred on October 27, 1985. *See* Lodged Documents at 144-45. Petitioner was charged on April 7, 1986 and sentenced on April 14, 1986. *Id.* Petitioner has lodged with the Court copies of public documents containing facts subject to judicial notice, but not included in the Joint Appendix. *See Papasan* v. *Allain*, 478 U.S. 265, 268 n.1 (1986) (Court may take notice of items in public record). The documents lodged with the Court are cited as "Lodg. Doc. ——."

Later, in 1993, petitioner pleaded *nolo contendere* to a separate offense and was sentenced to serve 4 years concurrent with his 22-year term. However, the 22-year term controls the duration of his incarceration. *See* J.A. 34. There is no dispute that, with his 1860 days of provisional release credits, petitioner would be entitled to immediate release. *See* J.A. 34, 50-52.

§ 944.598, Fla. Stat. (1983); § 944.276, Fla. Stat. (1987); § 944.277, Fla. Stat. (Supp. 1988). On the date of his offense, petitioner was statutorily eligible for early release credits conditioned on good behavior and prison overcrowding, which at that time were called emergency gain-time. § 944.598, Fla. Stat. (1985).[2] During his incarceration, petitioner became successively eligible under Florida law for early release credits that supplanted but were the substantial equivalent of emergency gain-time, including "administrative gain-time,"[3] and "provisional release credits."[4] When awarded, these credits reduced the actual time an inmate was required to serve in prison, *i.e.*, the time was "credited" against the prison sentence pronounced by the sentencing judge. Inmates maintained their eligibility for overcrowding-related credits through good behavior.[5]

[2] "Emergency gain time" was only available if Florida prison population reached a threshold percentage of capacity. *See* § 944.598, Fla. Stat. (1985) (Lodg. Doc. 27). Because the Florida prison population did not exceed the statutory trigger percentage, the Department of Corrections did not award emergency gain time to any inmate between 1983 and 1986.

[3] *See* § 944.276, Fla. Stat. (1987) (Lodg. Doc. 17).

[4] *See* § 944.277, Fla. Stat. (Supp. 1988) (Lodg. Doc. 19). From the perspective of the recipient, there was no relevant distinction among the different types of overcrowding credits. All such credits were awarded conditional on the inmate's good behavior and an executive finding that the prison system was approaching its lawful capacity. *See* § 944.598, Fla. Stat. (Supp. 1986) (Lodg. Doc. 29); § 944.276, Fla. Stat. (1987); § 944.277, Fla. Stat. (Supp. 1988). As part of a major revision of the Florida sentencing system in 1993, the Florida legislature repealed § 944.277. *See* 1993 Fla. Laws ch. 93-406. Florida thus no longer uses provisional credits as an early release mechanism. *See* § 944.278, Fla. Stat. (1993), (Lodg. Doc. 16).

[5] Inmates could obtain emergency credits if they were receiving "gain-time," which in turn depended on good behavior. *See* § 944.598(2), Fla. Stat. (1985) (Lodg. Doc. 27). Inmates were eligible for administrative gain-time and provisional credits as

Beginning in 1987, the Florida Legislature created a series of new offense-based exclusions from eligibility for early release credits.[6] A 1989 amendment to § 944.277 added an exclusion for inmates convicted of murder offenses, including petitioner's crime of attempted murder.[7] The 1989 amendment, and subsequent amendments containing the same exclusion enacted in 1990 and 1991, were applied prospectively only.[8] The 1992 amendment at issue in this case, effective July 6, 1992, contained the same offense-based exclusion. *See* § 944.277(1)(i), Fla. Stat. (Supp. 1992) (App. A).[9] The Florida Secretary of Corrections initially interpreted the 1992 amendment, like the earlier amendments to § 944.277(1), to apply only prospectively.

2. As the result of crowded prison conditions and Petitioner's good behavior, the Secretary of Corrections,

long as they were earning "incentive gain-time." *See* § 944.276(1), Fla. Stat. (1987); § 944.277(1), Fla. Stat. (Supp. 1988). Awards of incentive gain-time required that the inmate take positive action beyond mere observance of prison rules, such as holding a prison job. *See* § 944.275(4)(b), Fla. Stat. (1985) (Lodg. Doc. 13).

[6] The 1987 law providing for administrative gain-time, § 944.276, excluded from eligibility inmates serving mandatory minimums for certain felonies and convicted sex offenders who had not successfully completed a treatment program. The 1988 law creating provisional release credits, § 944.277, excluded habitual offenders, inmates serving mandatory minimums for drug and capital offenses, and inmates convicted of certain felonies in connection with an attempted or completed sexual assault.

[7] *See* § 944.277(1)(i), Fla. Stat. (1989) (Lodg. Doc. 21).

[8] *See* 1992 Op. Att'y Gen. Fla. 92-96 at 288 (December 29, 1992) (App. B).

[9] Petitioner's initial brief was somewhat imprecise in describing the chronology in 1992. *See* Pet. for Cert. at 3. The 1992 amendment to § 944.277(1)(i) was effective on July 6, 1992. Petitioner was released from prison on October 1, 1992. J.A. 50. The opinions of the Florida Attorney General prescribing the retroactive application of the 1992 amendment to § 944.277(1) were issued on December 29 & 31, 1992. *See* App. B & D.

acting pursuant to § 944.277, granted petitioner 1,860 days of "provisional release credits" toward early release between 1988 and 1991. J.A. 50.[10] Based on those credits, and on petitioner's full satisfaction of all of the statutory requirements for award and maintenance of early release credits, the State of Florida released petitioner from prison pursuant to § 921.001(10)(d) (Supp. 1992) on his mandatory release date of October 1, 1992. J.A. 50.[11]

On December 29, 1992, the Florida Attorney General, responding to the concerns of Florida legislators and state officials about the imminent release of a notorious sex offender and murderer, issued an opinion stating that the offense-based exclusions contained in § 944.277(1), as amended in 1992 ("the 1992 Act"), applied retroactively to exclude from eligibility for provisional credits all inmates who committed such offenses prior to the law's enactment.[12] Two days later, in response to an inquiry

[10] The Joint Appendix contains a typographical error, incorrectly indicating that petitioner received 1360 days of provisional release credits that were revoked pursuant to the 1992 Act. J.A. 52 (Glover Affidavit). The actual number of provisional release credit days awarded to petitioner was *1860*, as indicated two pages earlier in the same affidavit. *Id.* at 50.

[11] Florida law required the Secretary of Corrections to establish a non-discretionary "provisional release date," and to release petitioner on that date. *See* §§ 944.277(3), (5), 921.001(10)(d), Fla. Stat. (Supp. 1988) (Lodg. Doc. 12, 19-20). Florida further required that prisoners convicted on or after July 1, 1988 be released to probation or supervised release. *See* § 944.277(5), Fla. Stat. (Supp. 1992). Prisoners who committed offenses before July 1, 1988—including petitioner—were released unconditionally. *See id.*; Judgment and Sentence, *State of Florida* v. *Kenneth R. Lynce*, Orange Cty. CR 85-6173 (April 14, 1986) (Lodg. Doc. 146-50) (imposing no supervised or conditional release terms).

[12] *See* 1992 Op. Att'y Gen. Fla. 92-96 (December 29, 1992) (App. B). The opinion refers to sex offender Donald G. McDougall several times. *See id.* The rationale for the retroactive application of amended § 944.277 was that prior amendments in 1990 and 1991 had expressly provided for prospective application, while the 1992 amendment was silent on this matter. *Id.* at 287-89.

from the Department of Corrections, the Attorney General directed the Department to cancel all credits previously earned by inmates now deemed covered by the 1992 exclusions, reasoning that the award of provisional release credits was "strictly an administrative mechanism to relieve prison overcrowding." [13]

Pursuant to this executive agency re-interpretation of the 1992 Act, the Department of Corrections revoked the 1,860 days of provisional credit previously awarded to petitioner. J.A. 51. Because petitioner had been released from prison several months earlier, the Department sought a warrant for his rearrest. J.A. 51. On May 17, 1993, the sentencing court issued an Order for Execution of Sentence Imposed and Retaking of Prisoner. J.A. 51. Petitioner was arrested on June 8, 1993 and returned to prison. J.A. 51. The retroactive cancellation of petitioner's credits pushed his release date back to May 19, 1998. J.A. 52.

3. On August 18, 1994, petitioner filed a petition for a writ of habeas corpus alleging, *inter alia*, that the retroactive application to him of amended § 944.277(1) violated the prohibition against ex post facto laws set forth in Article I, Section 10, clause 1 of the United States Constitution. J.A. 2-29. Petitioner argued that the revocation of all provisional release credits previously awarded to him and his resultant re-incarceration was an unconstitutional increase in punishment for a crime after its commission. J.A. 22-25.

On March 14, 1995, a United States Magistrate Judge for the Middle District of Florida, relying on the Eleventh Circuit's opinion in *Hock* v. *Singletary*, 41 F.3d 1470 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 715 (1996), recommended that the petition be denied and dismissed with prejudice on the ground that the 1992 Act was adopted merely as a means to relieve prison overcrowding

[13] *See* Letter to Secretary Singletary (Dec. 31, 1992) (App. D).

and was, therefore, not subject to the prohibitions of the Ex Post Facto Clause. J.A. 53-60. The United States District Court for the Middle District of Florida adopted the Report and Recommendation and dismissed the petition on May 10, 1995. J.A. 64.[14] Petitioner subsequently filed with the district court an Application for a Certificate of Probable Cause, which the court denied on June 16, 1995. J.A. 65.

4. The United States Court of Appeals for the Eleventh Circuit denied without comment petitioner's renewed Application for a Certificate of Probable Cause by Order dated October 16, 1995. J.A. 66.

On Jan. 10, 1996, petitioner filed with this Court a petition for writ of certiorari. On May 13, 1996, the Court granted certiorari. J.A. 67.

SUMMARY OF ARGUMENT

This case involves an inmate who served the full time prescribed by Florida law for his crime, was released from custody unconditionally, and then, based on a belated interpretation of a new state statute, was reincarcerated by the State of Florida for an additional five years for the same offense. Respondents used the 1992 Act to strip petitioner of early release credits previously awarded

[14] Respondents initially argued in district court for the dismissal of Mr. Lynce's habeas corpus petition on the ground that he had failed to exhaust state law remedies. Respondents conceded, however, that with respect to the central question of the retroactive cancellation of early release credits, exhaustion would be futile. *See* Respondent's Answer to Petition for Writ of Habeas Corpus (J.A. 36). Indeed, the Florida Supreme Court had recently held constitutional the retroactive application of § 944.277 (1992) to withdraw provisional release credits already awarded, *see Griffin* v. *Singletary*, 638 So. 2d 500, 501-02 (Fla. 1994), *see also Dugger* v. *Rodrick*, 584 So. 2d 2 (Fla. 1991), *cert. denied sub nom. Rodrick* v. *Singletary*, 502 U.S. 1037 (1992), and there was no reason to believe that the court would change its position. *See* Petition for Writ of Habeas Corpus (J.A. 12-14); *see also Schall* v. *Martin*, 467 U.S. 253, 261 (1984).

and reimprison him, thereby retroactively increasing the punishment for his crime. The 1992 Act, as applied to petitioner, is an unconstitutional ex post facto law, because it directly increased the punishment for his crime, several years after its commission.

A long line of cases from this Court has established that laws that retroactively increase punishment are prohibited by the Ex Post Facto Clause. This foundational principle is rooted in the Framers' concern—based on their own experience—that in the absence of an absolute and unequivocal prohibition, state and federal governments would be free to modify crimes and their punishments without fair warning or notice to potential offenders, and to enact arbitrary or vindictive retroactive legislation targeting disfavored groups. Respondents' application of the 1992 Act ignored that prohibition, in an exercise of precisely the governmental excesses the Ex Post Facto Clause is designed to prevent.

The central feature of punishment for a felony is the actual length of incarceration. Under Florida law, a prisoner's "real sentence," *i.e.*, the actual duration of his incarceration, is determined by the interaction of the nominal sentence imposed by the sentencing judge pursuant to sentencing guidelines and several statutorily prescribed types of early release credits. By nullifying early release credits previously awarded to petitioner, the 1992 Act directly increased his punishment, lengthening his actual term of incarceration by more than five years.

Unlike changes to procedures this Court has upheld as having only a conjectural effect on actual punishment, the increased punishment meted out to petitioner was a direct and certain result of the application of the 1992 Act. Petitioner completed his sentence and was released unconditionally in October 1992, nearly three months before the Florida Attorney General's opinion. Petitioner's re-incarceration by the Florida Department of Corrections in June of 1993 was based solely on his 1985 offense

of conviction.[15] Thus, the re-imprisonment of petitioner for an additional five years for the same conduct was the direct and concrete result of the retroactive application of the 1992 Act.

Exempting the retroactive cancellation of provisional release credits from the proscription of the Ex Post Facto Clause would flatly contravene established precedent from this Court. The Court has consistently refused to allow the retroactive application of laws changing sentencing formulas, and mechanisms determinative of actual sentence length, to the detriment of persons who committed crimes prior to the enactment of the new sentencing laws. *See, e.g., Miller* v. *Florida*, 482 U.S. 423 (1987); *Weaver* v. *Graham*, 450 U.S. 24 (1981); *Lindsey* v. *Washington*, 301 U.S. 397 (1937). The 1992 Act, as applied to petitioner, retroactively changed the formula for calculating his term of incarceration. Indeed, in applying the 1992 Act, respondents went much further by actually revoking *previously awarded credits*, which resulted in the imposition of a longer term of incarceration not only after the commission of the crime, but also after sentence had been imposed and fully served.

This Court has held that whether a given statutory change constitutes an ex post facto violation is a matter of degree. It would be irrational to find that, while the retroactive application of a new formula for calculating an offender's initial sentencing range offends the Constitution, a law which operates retroactively to increase a sentence after it is imposed and served somehow falls outside the protection of the Ex Post Facto Clause.

Moreover, given the mounting overcrowding crisis in Florida's prisons in 1986, it was rational for Mr. Lynce

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[15] As previously noted, *supra* note 1, shortly after his reincarceration in 1993, petitioner pleaded *nolo contendere* to an independent new charge based on conduct after his October 1992 release, and was sentenced to four years to be served concurrently with the renewed sentence (for his 1985 crime) at issue in this case.

(and for similarly situated accused offenders) to factor the availability of these credits into his decision to plead *nolo contendere* to the charge of attempted murder. Thus, the 1992 Act also violated petitioner's interest in notice and fair warning and his reasonable expectation at the time of his plea and sentencing, based on the law in effect in 1986, that there existed a strong likelihood that early release credits based on prison overcrowding would shorten his prison term.

The 1992 Act is not a procedural law. The *sine qua non* of a purely procedural law for purposes of ex post facto analysis is the lack of effect on the quantum of punishment attached to the crime. The 1992 Act changed the quantum of punishment attached to a particular crime by excluding a selected group of offenders from eligibility for future credits and by canceling the credits they had already earned under the prior law. Whether the former law was enacted as a matter of administrative convenience is irrelevant—the 1992 Act is a substantive penal statute, fully subject to the requirements and prohibitions of the Ex Post Facto Clause.

ARGUMENT

I. THE 1992 AMENDMENT TO § 944.277 (the "1992 Act"), WHICH RETROACTIVELY WITHDREW PROVISIONAL RELEASE CREDITS FROM FLORIDA PRISONERS AFTER THOSE CREDITS WERE AWARDED, VIOLATED THE EX POST FACTO CLAUSE BY INCREASING PETITIONER'S PUNISHMENT FOR CRIMES AFTER THEIR COMMISSION.

The Ex Post Facto Clause of the United States Constitution prohibits laws that retroactively increase the punishment attached to a crime. *California Dep't of Corrections* v. *Morales*, 115 S. Ct. 1597, 1601 (1995); *Collins* v. *Youngblood*, 497 U.S. 37, 42 (1990); *Beazell* v. *Ohio*, 269 U.S. 167, 169 (1925); *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390-92 (1798). It has been established

since the early days of our Republic that the constitutional prohibition against ex post facto laws is essential to restrain the arbitrary and vindictive exercise of government power, and to allow affected individuals to rely upon contemporary penal laws until those laws are explicitly changed. *Id.* at 387; *see Weaver*, 450 U.S. at 28-31; The Federalist No. 44 (James Madison); The Federalist No. 84 (Alexander Hamilton).[16] The fact that the Ex Post Facto Clause is one of the few express limits on the powers of the states found in the Constitution attests to its importance as a fundamental limitation on governmental power. *See* U.S. Const. art. I, § 10, cl. 1. An unbroken line of cases from *Calder* through *Morales* has held that the Ex Post Facto Clause prohibits state and federal governments from increasing the punishment for a crime retroactively, regardless of the government's reason for increasing the punishment, or the label it affixes to the law effecting that change. *See, e.g., Youngblood*, 497 U.S. at 43; *Weaver*, 450 U.S. at 31.

However, the Court has held that not every law that retroactively "disadvantages" an offender violates the Constitution. *Morales*, 115 S. Ct. at 1601, 1602 n.3. A retroactive criminal law disadvantaging an offender does not violate the Ex Post Facto Clause if it is merely "procedural." *See Dobbert* v. *Florida*, 432 U.S. 282, 293-94 (1977). To violate the constitutional prohibition, a law must "produce a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, 115 S. Ct. at 1603. Although this Court has not enunci-

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[16] Justice Chase, writing for the Court in *Calder*, eloquently described the Framers' historical and contemporary concerns, and the policies underlying the Ex Post Facto Clause, concluding that the Clause was one of the great principles of our social compact. *Calder*, 3 U.S. (3 Dall.) at 388-390. *Calder* identified four categories of laws prohibited by the Ex Post Facto Clause, two of which are most pertinent here: "2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Id.* at 390.

ated a precise formula for determining how large this risk must be, *Morales* made clear that laws creating only a "speculative, attenuated risk" of increasing punishment do not violate the Ex Post Facto Clause. *Id.* at 1603.

A. As Applied to Petitioner, the 1992 Act Violated the Ex Post Facto Clause by Increasing Retroactively the Punishment for His Crime After Its Commission and Returning Him to Prison for an Additional Five Years.

The central question in an ex post facto analysis of changes to laws affecting criminal sentences is not whether a prisoner's original sentence technically has been increased by a retroactive law, but whether an important statutory determinant of the actual length of his sentence has been altered to his detriment. *See Weaver*, 450 U.S. at 32; *Lindsey* v. *Washington*, 301 U.S. 397, 401-02 (1937). Accordingly, this Court has held that the determinants of early release are properly considered part of the punishment of a crime. *See Weaver*, 450 U.S. at 32; *Warden* v. *Marrero*, 417 U.S. 653, 662-63 (1974).[17]

The three most closely analogous ex post facto decisions of this Court compel the conclusion that the application of the 1992 Act to petitioner retroactively increased his punishment, in violation of the Ex Post Facto Clause and the interests it protects. In *Lindsey* v. *Washington*, 301 U.S. 397 (1937), the Court considered a statute that

[17] From a practical standpoint, laws directly influencing a prisoner's date of release are an integral part of the punishment for crimes, because they are a significant factor in both a defendant's plea decision and in a judge's calculation of the sentence to be imposed. *See Weaver* 450 U.S. at 32; *Marrero*, 417 U.S. at 658. *Marrero* also noted that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex post facto* clause . . . of whether it imposed a 'greater or more severe *punishment* than was prescribed by law at the time of the . . . offense.'" *Id.* at 663 (emphasis in original) (quoting *Rooney* v. *North Dakota*, 196 U.S. 319, 325 (1905)).

changed what had previously been the maximum sentence for the crime of grand larceny to the mandatory sentence. This Court held that the application of this statute to persons who committed grand larceny before its enactment violated the Ex Post Facto Clause, by increasing the measure of punishment prescribed by the statute in effect when the crimes were committed. *See id.* at 400-01. The Court rejected the argument that the new law was constitutional because it was possible that the sentencing court might have imposed the statutory maximum under the old statute, which would result in the same prison sentence required by the new statute. *Id.* The Court emphasized that the constitutional transgression of the statute was the detrimental change in the *possible penalty* for a crime already consummated. *See id.* at 401.

Reaffirming the basic principle of *Lindsey*, the Court held in *Weaver* and in *Miller* v. *Florida*, 482 U.S. 423 (1987), that statutes that alter the formula used to calculate the sentences of individuals who committed crimes before the changes were enacted violate the Ex Post Facto Clause. The offending statute in *Weaver* retroactively reduced the number of days, *i.e.*, "early release credits," deducted from inmates' sentences for compliance with prison rules. *See Weaver*, 450 U.S. at 26-28. As applied, the statute at issue in *Weaver* had the prohibited effect of retroactively increasing the minimum sentence that the petitioner could have received under the law in place at the time of his crime. *See id.* at 33-35. Similarly, in *Miller*, the statute in question altered the formula for calculating the petitioner's presumptive sentencing range by increasing the number of sentencing "points" assigned to his offense *after* he committed the crime. *See Miller*, 482 U.S. at 425-27. The Court struck down the retroactive application of this law as an unconstitutional ex post facto increase in petitioner's punishment. *See id.* at 435-36.

In *Morales*, 115 S. Ct. at 1601, the Court made clear the continued vitality of the *Lindsey-Weaver-Miller* "trilogy" when it distinguished the procedural change at issue in the case at bar from the ex post facto violations found in the trilogy.[18] The Court reaffirmed the core principle of the trilogy, citing the cases for the proposition "that a legislature may not stiffen the 'standard of punishment' applicable to crimes that have already been committed" by "changing the sentencing range applicable to covered crimes. . . ." *Morales*, 115 S. Ct. at 1601, 1602. Legislative "adjustments to mechanisms surrounding the sentencing process"—like early release credits—are evaluated under the same standard. *Id.* at 1603 n.4.

Based on the standards established in *Lindsey*, *Miller* and *Weaver*, this is not even a close case. If the Florida Legislature had merely declared that, from the effective date of the 1992 Act forward, petitioner and similarly situated prisoners would no longer be eligible to receive provisional release credits, this case would be essentially on all fours with *Weaver*. *See Morales*, 115 S. Ct. at 1601 (Ex Post Facto Clause prohibits retroactive statutes having "the purpose and effect of enhancing the range of available prison terms. . .").[19]

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[18] As described in greater detail, *infra*, *Morales* involved a state statute that reduced the presumptive frequency of parole hearings for persons convicted of homicide, but retained identical substantive standards governing a prisoner's eligibility for parole. *Morales*, 115 S. Ct. at 1602. The Court held that because the statutory change was a mechanical change creating no significant risk of increased punishment, it did not transgress the boundaries set by the Ex Post Facto Clause. *Id.* at 1603.

[19] There can be no question that the 1992 Act is a retroactive law. This Court recently stated that a law is retroactive if "the new provision attaches new legal consequences to events completed before its enactment." *Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1499 (1994). This inquiry requires a court to determine the nature of the legal change and the degree of connection between this change and relevant past events. *Id.* At the time of his conviction, petitioner was eligible for all types of early release credits. The 1992 Act rendered him ineligible for provisional credits and resulted in the cancellation of credits already held. Thus, the 1992 Act changed the legal consequences of a crime committed in 1985. Moreover, the immediate withdrawal of credits previously earned demonstrates that there was a direct and substantial connection between the legal change and petitioner's past crime.

Because the 1992 Act, as applied, did not stop at canceling petitioner's eligibility for the future award of credits, the retroactive punishment inflicted on petitioner was more egregious than those held unconstitutional in *Lindsey*, *Weaver* and *Miller*. Respondents applied the 1992 Act to withdraw 1,860 days of early release credits *already awarded* to him under a prior statute, resulting in the retroactive "re-calculation" of his release date *after he had been released* from prison. Thus, as a direct and immediate result of the application of the 1992 Act, petitioner was re-arrested and returned to prison to serve more than five additional years. It is difficult to envision a more clear example of a statute that "[made] more burdensome the punishment for a crime, after its commission. . . ." *Youngblood*, 497 U.S. at 52.[20]

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[20] The conclusion that the application of the 1992 Act to petitioner violates the Ex Post Facto Clause is supported by *Arnold* v. *Cody*, 951 F.2d 280 (10th Cir. 1991). There, the Tenth Circuit invalidated a statute which denied inmates continued ability to acquire early release credits available under prior law. *Id.* The statute at issue in *Arnold* provided for selective withdrawal of eligibility for "overcrowding" early release credits. *See id.* at 281. Critical to the *Arnold* court's holding was its finding that credits earned for good behavior were indistinguishable from credits acquired as the result of prison overcrowding. *Id.* at 283. *Arnold* lends support to the conclusion that laws changing eligibility standards for prison overcrowding credits are indistinguishable from the law reducing good behavior credits which this Court held invalid in *Weaver*. Moreover, the fact that the 1992 Act was used to strip petitioner of provisional credits previously awarded (rather than simply deny him future eligibility) suggests that this law lies even further toward the unconstitutional end of the spectrum

Whether the statutory change in the punishment for a crime is accomplished by a change to the nominal sentence imposed by the sentencing judge, as in *Lindsey*, or by adjusting a related determinant of a prisoner's "real" punishment, as in *Weaver*, is of no legal relevance. *See Lindsey*, 301 U.S. at 401; *Weaver*, 450 U.S. at 35-36. The 1992 Act had the direct and undeniable effect of increasing petitioner's punishment after his crime had been consummated. Therefore, the Act violated the clear command of the Constitution, as consistently enforced in every Ex Post Facto Clause decision rendered by this Court from *Calder* through *Lindsey* to *Morales*.

B. *Morales'* Refinement of the *Lindsey-Weaver-Miller* Rule Does Not Change the Result in This Case.

Although the Court's recent decision in *Morales* refocused the ex post facto analysis in some respects, the retroactive increase in punishment effected by the 1992 Act is just as clearly prohibited today as it was before *Morales*. In *Morales*, the Court simply clarified that, in order to show an ex post facto violation, an offender must show the retroactive harm was more than some ambiguous "disadvantage," or the mere denial of an uncertain "opportunity" to take advantage of early release provisions. *Morales*, 115 S. Ct. at 1602 n.3. Instead, a statutory change violates the ex post facto prohibition if it "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Id.* (citing *Youngblood*, 497 U.S. at 41). *Morales* also made clear that the application of the Ex Post Facto Clause is a matter of degree and that small "mechanical" changes producing only a slight or speculative risk of increasing

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than the offending law in *Arnold*. *See Morales*, 115 S. Ct. at 1603 (whether given retroactive statute violates Ex Post Facto Clause is matter of degree).

a prisoner's term of confinement do not fall within the constitutional prohibition. *Id.* at 1602-03.[21]

The respondent in *Morales* was a twice-convicted murderer. At the time respondent committed the second murder, California statutes provided for annual parole suitability hearings. *Id.* at 1600. After the second murder, but before respondent was sentenced, California changed its law to provide that, after a multiple murderer's initial parole suitability hearing, future hearings could be deferred for up to three years if the parole board found that it was unreasonable to expect that the prisoner would be found suitable for parole in the intervening years. *Id.* The substantive standards for determination of eligibility for parole were identical to those in effect at the time of the offense. *Id.* at 1602-03. The Court rejected the respondent's challenge to the change in the frequency of parole hearings, finding the slight risk that such a change might increase his actual term of confinement too speculative, attenuated and conjectural, and thus insufficient to warrant invalidation under the Ex Post Facto Clause. *Id.* at 1604-05.

As applied to petitioner, the 1992 Act unquestionably "produce[d] a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 1603. Far from the "speculative and attenuated" connection presented in *Morales*, the link between the withdrawal of provisional release credits from petitioner and the substantial lengthening of his prison term was clear, direct,

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[21] Examples of sentencing and parole law changes falling outside the protections of the Ex Post Facto Clause cited in *Morales* included changes to the membership of parole boards, changes to the hours of prison law libraries, restrictions on a defendant's time to speak before a sentencing judge, and page limits on a defendant's objections to presentence reports or petitions for pardon. *Id.* at 1603. None of these remotely approaches in severity the direct lengthening of a sentence by five years after a full sentence had been lawfully served.

and certain. *Id.* The "risk" of increased punishment for petitioner's crime resulting from the application of the 1992 Act was 100%. *Cf. id.* As the direct and certain result of the retroactive application of the 1992 Act, the State of Florida increased petitioner's punishment over that prescribed by the law in effect at the time of his crime, reimprisoning him for an additional five years.

Moreover, unlike the statute at issue in *Morales,* the 1992 Act contained absolutely no features to reduce the risk that the statute would increase petitioner's punishment. The statute challenged in *Morales* afforded protections that minimized the risk that a prisoner would serve a longer time in prison than he would have served under the prior law. *See id.* at 1603-05. First, the statute applied to a class of prisoners with only a remote possibility of release on parole. *See id.* at 1603. Second, the parole board was required to make a specific finding for each prisoner at his mandatory initial hearing that the likelihood of release on parole was effectively nil. *See id.* at 1604. Finally, the parole board retained discretion to tailor the frequency of subsequent hearings to the circumstances of the particular prisoner. *See id.* The existence of these protections meant that "the practical effect of a hearing postponement [was] not significant." *Id.* at 1605.

By contrast, the 1992 Act was an unadorned offense-based exclusion from eligibility for early release credits. *See* § 944.277, Fla. Stat. (Supp. 1992) (App. A). The Florida Attorney General discovered authority to cancel petitioner's early release credits not in the language of the 1992 Act, but rather in implied legislative intent.[22] Any protective features would necessarily emanate from the

[22] The Attorney General reasoned that since past amendments had expressly provided for prospective application of § 944.277, the lack of any such directive in the 1992 Act suggested a legislative intent for it to apply retrospectively. *See* 1992 Op. Att'y Gen. Fla. 92-96 at 287-89 (Dec. 29, 1992) (App. B).

same source. The Attorney General apparently did not discern any intent by the Florida Legislature to limit in any way the power of the Department of Corrections to withdraw previously awarded credits. *See* Letter to Secretary Singletary (Dec. 31, 1992) (App. D). The absence of any protective or mitigating features in the 1992 Act similar to those in the law upheld in *Morales* reinforces the conclusion that the increase in punishment imposed by Florida is proscribed by the Ex Post Facto Clause.

C. Provisional Release Credits and Other Early Release Credits Are an Integral Part of the Punishment Attached to Petitioner's Crime and a Critical Determinant of the Length of His Incarceration.

This Court has established that statutory "adjustments" to a prison sentence are part and parcel of the punishment imposed. *See Weaver,* 450 U.S. at 32; *Warden* v. *Marrero,* 417 U.S. 653, 658 (1974); *see also Morales,* 115 S. Ct. at 1603 n.4 (adjustments to "mechanisms surrounding the sentencing process" are subject to same ex post facto analysis as other statutory changes). Penal laws that add or subtract time from an inmate's period of incarceration need not be "in some technical sense part of the sentence" to be an essential determinant of the actual punishment for crimes. *Weaver,* 450 U.S. at 32 (citing *Lindsey,* 301 U.S. at 402-03); *cf. Marrero,* 417 U.S. at 662-63 (parole is an element of punishment).

Early release credits were an integral component of Florida's structured sentencing system as it existed during the period relevant to this case.[23] Beginning in 1983,

[23] Implicit in the Court's opinion in *Morales* is the principle that a statute would violate the Ex Post Facto Clause if it operated directly to deny a prisoner parole under circumstances in which he would clearly have been granted parole under the statute in effect at the time he committed the crime. *See generally Morales,* 115 S. Ct. 1597. Early release credit, or "gain-time" is as integral to the punishment for a crime in Florida as parole had been under

Florida imposed prison sentences under a "real offense" sentencing guidelines system. Under this system, the statutes defining the criminal offense provide only the extreme outer limits of the sentence that lawfully could be imposed.[24] However, under ordinary circumstances, the sentence actually pronounced by the judge is determined by application of a sentencing matrix established by the Florida Sentencing Guidelines. *See generally* §§ 921.001-921.005, Fla. Stat. (1985) (Lodg. Doc. 9-10). At the time petitioner committed his crime, the "real time" served by a person convicted of a crime in Florida, *i.e.*, the time he actually served in prison, was determined by the interaction of the guideline sentence pronounced by the sentencing judge and several types of "gain-time" or early

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the traditional sentencing system in place in Florida prior to 1983. The legislative history of the Florida Correctional Reform Act of 1983, 1983 Fla. Laws ch. 83-131, demonstrates that "gain-time" in all of its forms was intended to function as the substitute for parole within the framework of structured sentencing. Under the new early release regime, "[p]ersons convicted on or after the effective date of the act [would] no longer be eligible for parole and [would] have their release governed by expiration, *gain-time*, or clemency." *See* Senate Staff Analysis and Economic Impact Statement for SB 644 at p. 2 (May 24, 1983) (emphasis added) (Lodg. Doc. 39). The legislative history of the 1987 law creating administrative gain-time also demonstrates the Legislature's intent that gain-time would supplant parole as the primary mechanism for shortening an inmate's term of confinement: "With the creation of the Sentencing Guidelines by the 1983 Legislature and the elimination of parole for inmates sentenced after Oct. 1, 1983, gain-time accumulation is virtually the exclusive method of release from confinement." *See* Senate Staff Analysis and Economic Impact Statement for SB 3A at p. 1 (Feb. 4, 1987) (Lodg. Doc. 46). When this new provision for overcrowding-related early release credits was enacted, it was clear that "nondiscretionary release device[s]" were as instrumental as parole had been in "determin[ing] the actual length of sentence to be served." *See id.*

[24] The statute prescribing the outer limit of petitioner's sentence was § 775.082, Fla. Stat. (1985) (Lodg. Doc. 2).

release credits.[25] The guideline statute in effect at the time of petitioner's offense and conviction provided, in part, that an offender "shall be released from incarceration . . . [u]pon expiration of his sentence *as reduced by accumulated gain-time*." § 921.001(8)(b), Fla. Stat. (1985) (emphasis added) (Lodg. Doc. 10).

State law plainly provides that early release gain-time was an integral part of the punishment imposed for petitioner's offense. The sentencing guidelines promulgated by the Florida Supreme Court provides as follows:

> [t]he sentence imposed by the sentencing judge should reflect the length of time to be served, shortened only by the application of gain-time.

Fla. R. Crim. P. 3.701(b)(5) (1985) (reported in *The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988—Sentencing Guidelines)*, 468 So. 2d 220, 222 (Fla. 1985)) (Lodg. Doc. 32).

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[25] Early release credits in the form of "emergency gain-time" were created at the same time as Florida's sentencing guidelines and accompanied the abolition of parole and other major sentencing reforms. *See* The Correctional Reform Act of 1983, 1983 Fla. Laws ch. 83-131 (codified in part at § 944.598, Fla. Stat. (1983)) (Lodg. Doc. 26); *see also* § 921.001(3), (7), Fla. Stat. (1983) (Lodg. Doc. 7-8). Under pre-1983 indeterminate sentencing, parole and gain-time had been used for early release to target limited penal resources. *See, e.g.*, Senate Staff Analysis and Economic Impact Statement for SB 210 at p. 1 (rev. Mar. 7, 1989) (Lodg. Doc. 48-49); Corrections Overcrowding Task Force, *Final Report and Recommendations* 65 (1983) ("COTF Report") (Lodg. Doc. 109). The new guidelines and the abolition of parole gave rise to another early release mechanism to replace parole. *See, e.g.*, Samuel Jacobson, *Sentencing Guidelines*, 57 Fla. Bar J. 234, 236 (1983); Jim Smith, Fla. Att'y Gen., *A Major Revision of the System is Needed*, at 208-09 (in Jacobson, *Sentencing Guidelines* (1983)); COTF Report at 68-70. Gain-time, including emergency gain-time and its successors, replaced parole as the primary limitation on the duration of the new guidelines sentences. *See, e.g.*, Fla. R. Crim. P. 3.701(b)(5) (1983, 1985) (Lodg. Doc. 32).

In 1988, when the Legislature created provisional release credits, it also amended the sentencing statute to provide that a prisoner "shall be released from incarceration" on the occurrence of one of four events, including "attain[ment] [of] the provisional release date." § 921.001(10), Fla. Stat. (Supp. 1988). A prisoner's "provisional release date" is the date determined by the length of the sentence imposed by the sentencing judge, as reduced by early release credits, including "gain-time" and provisional release credits. *See* § 944.277(3), Fla. Stat. (Supp. 1992) (App. A) (provisional release date); *see also* § 944.275(3), Fla. Stat. (1987) (Lodg. Doc. 17) (tentative release date).

Respondents apparently concede that early release credits awarded for good behavior and diligent labor are an integral part of the punishment for crimes under Florida law and, therefore, cannot be withdrawn without violating the Ex Post Facto Clause. *See Dugger* v. *Rodrick*, 584 So. 2d 2 (Fla. 1991) (cited with approval in 1992 Op. Att'y Gen. Fla. 92-96 (Dec. 29, 1992) (App. B)), *cert. denied sub nom. Rodrick* v. *Singletary*, 502 U.S. 1037 (1992). Indeed, the Florida Attorney General recently opined that a rule denying good behavior and incentive credits may be applied only prospectively and that credits previously awarded may not be withdrawn. *See* Op. Att'y Gen. Fla. 96-22 (March 20, 1996) (Lodg. Doc. 61-64). However, Respondents contend that early release credits awarded based on the same criteria, but available only during periods of prison overcrowding, are so different in kind that they are exempt from the requirements of the Ex Post Facto Clause. Opp. to Pet. for Cert. 5-9.

Neither the law nor the practical operation of the Florida penal system supports such a distinction between provisional credits and good behavior credits. It is unreasonable and logically inconsistent to acknowledge that good behavior credits reduce punishment, while simultaneously maintaining that provisional credits are merely "administrative" and do not affect significantly the punishment attached to a crime.[26] Under Florida law, "gain-time" and "incentive gain-time" credits are awarded for various types of good behavior. *See* § 944.275, Fla. Stat. (1987) (Lodg. Doc. 17). Provisional release credits were additional credits awarded for good behavior when prisons were overcrowded. § 944.277, Fla. Stat. (Supp. 1988, 1989) (Lodg. Doc. 19-20, 21-22).[27] Thus, provisional credits and good behavior credits are identical except that the former only became available if Florida prisons approached their lawful capacity. Effectively, prior to the 1992 Act Respondents could award a certain quantity of "good behavior" early release credits and then, in the event prison population reached a certain level, they could award additional, indistinguishable credits to the same prisoners who qualified for good behavior credits.

Respondents can offer no principled basis to distinguish between provisional release credits and other types of early release credits for purposes of ex post facto analysis.

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[26] The judge who sentenced petitioner apparently held the common sense view that early release credits were part of the petitioner's sentence, and that the different types of credits are indistinguishable from the standpoint of punishment. In his sentencing order, Judge Walter Komanski recommended that, "[i]n imposing the above sentence, . . ." the Department of Corrections should make available "credit Good/Gain-time." Lodg. Doc. 150. This brief entry on the "SENTENCE" form suggests that, in the sentencing judge's mind, both good behavior credits and all other varieties of gain-time played essentially the same role in the contemporary Florida penal system.

[27] Provisional release credits could be awarded when prisons reached 97.5% of their lawful capacity. § 944.277, Fla. Stat. (Supp. 1988) (Lodg. Doc. 19). When the prison population reached that trigger level, inmates who satisfied the requirements for "incentive gain-time" were eligible for an award of provisional release credits, subject to offense-based exclusions. There were no other preconditions for the award of provisional release credits.

Accordingly, the retroactive withdrawal of provisional release credits violates the Ex Post Facto Clause.

D. The Retroactive Offense-Based Exclusions Created by the 1992 Act Undermine the Fundamental Interests the Ex Post Facto Clause Is Designed to Protect.

At least three important public policies underlie the Ex Post Facto Clause: (1) to restrain government from enacting arbitrary and vindictive legislation, *see Miller* v. *Florida*, 482 U.S. 423, 429 (1987); *Weaver*, 450 U.S. at 29; *Malloy* v. *South Carolina*, 237 U.S. 180, 183 (1915); (2) to give the public fair warning of and permit reliance on the criminal law, *see Miller*, 482 U.S. at 430; *Weaver*, 450 U.S. at 28; and (3) to maintain the separation of powers, *see Weaver*, 450 U.S. at 29 n.10. Respondents' application of the 1992 Act to petitioner flouts each of those policies.

Most significantly, the retroactive application of the 1992 Act to re-imprison petitioner exemplifies arbitrary and vindictive government treatment of a selected group of citizens in service of political expedience. It is clear from the Florida Attorney General's opinion that his novel interpretation of the 1992 Act was prompted by concerns expressed by certain elected officials about the impending release of Donald McDougall, an infamous murderer and child abuser who had accumulated provisional release credits pursuant to statute.[28] Without any clear textual support, the Florida Attorney General adopted an interpretation of the 1992 Act that not only precluded future acquisition of provisional credits by those convicted of

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[28] *See* 1992 Op. Att'y Gen. Fla. 92-96 at 283 (December 29, 1992) (App. B) ("[T]here is great concern in Central Florida regarding the impending release of Donald Glenn McDougall who was convicted of second degree murder and aggravated child abuse."); *see also* Letter to Attorney General Butterworth (Dec. 30, 1992) (App. C).

murder offenses, but also required the revocation of all credits previously awarded to members of this disfavored group.[29] The result of this construction of the 1992 Act was to cancel the scheduled release of a large number of Florida prisoners and to reimprison petitioner and approximately 90 others.[30]

No authority need be cited for the proposition that the impending release of violent offenders is an unsettling prospect for many citizens and their elected representa-

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[29] *See* Letter to Secretary Singletary (Dec. 31, 1992) (App. D). This Court recently reaffirmed the principle that, absent clear contrary legislative intent, statutes are presumed to apply only prospectively. *See Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1496 (1994) and authority cited therein. This presumption against retroactivity is deeply rooted in our nation's jurisprudence and finds expression in several provisions of our Constitution, including Article I, § 10. *Id.* at 1497; *see Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) (the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."). The Ex Post Facto Clause demonstrates the Framers' concern that the "[Legislature's] responsivity to political pressures pose[d] a risk that it [would be] tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 114 S. Ct. at 1497. The Florida Attorney General failed to apply the presumption against retroactivity to the 1992 Act when he implied a legislative intent to withdraw early release credits previously granted to selected classes of inmates who committed crimes prior to the 1992 enactment. *See* 1992 Op. Att'y Gen. Fla. 92-96 (Dec. 29, 1992) (App. B); Letter to Secretary Singletary (Dec. 31, 1992) (App. C). The Ex Post Facto Clause is intended to prevent this unfair method of governance. Indeed, without constitutional restraints on retroactive legislation, the "Legislature's unmatched powers [would] allow it to sweep away settled expectations suddenly and without individualized consideration." *Landgraf*, 114 S. Ct. at 1497.

[30] *See* Wilda L. White, "New State Policy Shatters Freed Convict's New Life," *Miami Herald* 1A (Aug. 3, 1993) (Lodg. Doc. 152) (89 released prisoners re-imprisoned after revocation of provisional credits).

tives. There was an undeniable, strong temptation under the circumstances for the government to fail to meet the high standard of restraint and respect for the rights of unpopular minorities required by the Ex Post Facto Clause. Viewed in this light, the response of the Florida legislative and executive branches to the passions and concerns of their constituents was understandable. Of course, whether a government action was an understandable response to constituent pressure is not the constitutional test. Because that response retroactively imposed greater punishment on a selected group of citizens, it violates the Ex Post Facto Clause.

The application of the 1992 Act also violated basic separation of powers principles by granting to the Legislature the power to determine the retroactive effect of penal laws, thereby usurping the role of the judiciary and the executive. *See Weaver*, 450 U.S. at 29 n.10. Finally, as demonstrated in the following section, the application of the 1992 Act frustrated petitioner's reasonabie expectations and reliance on the law in effect at the time of his conduct and at the time of his plea and sentencing, by changing the law retroactively and without fair warning. *Cf. id.* at 28-29.

E. At the Time of His Plea and Sentencing, Petitioner Reasonably Should Have Expected That He Would Benefit from the Award of Provisional Release Credits.

Several decisions of this Court note that the Ex Post Facto Clause also protects a prisoner's reliance in plea bargaining on his reasonable expectations regarding punishment and his right to fair notice and warning regarding changes in the law governing punishment. *See Weaver*, 450 U.S. at 32; *cf. Morales*, 115 S. Ct. at 1604. In denying petitioner's habeas request, the district court relied primarily on the opinion of the Eleventh Circuit in *Hock* v. *Singletary*, 41 F.3d 1470 (11th Cir. 1995), *cert.*

denied, 116 S. Ct. 715 (1996).[81] *Hock* held that the retroactive denial of "control release"[82] credits to previously eligible inmates did not violate the Ex Post Facto Clause, in part because the expectation of early release due to prison overcrowding was too conjectural. 41 F.3d at 1472-73. The court reasoned that, unlike "gain-time" early release credits for good behavior, *see Weaver*, 450 U.S. at 32, "control release" credits were contingent on future overcrowding and, therefore, a prisoner could not reasonably rely on the potential award of such credits in making plea bargaining decisions. *See Hock*, 41 F.3d at 1472-73.[83]

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[81] *See* Order of the United States District Court Dismissing Petition (J.A. 64); Report and Recommendations of United States Magistrate Judge (J.A. 58-59).

[82] The "control release" statute, § 947.146(2), Fla. Stat., was enacted in 1989 and provided for another category of early release credits to maintain the prison population at or below 99 percent of lawful capacity. *See Hock*, 41 F.3d at 1472-73.

[83] This analysis flatly contradicts that court's prior decision in *Raske* v. *Martinez*, 876 F.2d 1496 (11th Cir.), *cert. denied*, 493 U.S. 993 (1989), where it held that a law resulting in the retroactive denial of "incentive gain-time" violated the Ex Post Facto Clause. "Incentive gain-time" is a type of early release credit awarded for exceptionally diligent work and good deeds. *See, e.g.*, § 944.275(4)(b)-(c), Fla. Stat. (1993) (Lodg. Doc. 15). This Court has previously recognized that the award of incentive gain-time "is purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate, such as saving a life or diligent performance in an academic program." *Weaver*, 450 U.S. at 35. The *Raske* court noted that "the [Florida Corrections] department decides *in its sole discretion* whether the prisoner has behaved well enough or worked diligently enough to earn gain-time" and that "the opportunity to earn incentive gain-time is *dependent on the grace of the legislature* and the availability of jobs . . ." 876 F.2d at 1499-1500 (emphasis added). Despite the fact that an inmate's acquisition of incentive gain-time is contingent on legislative and executive decisions and other circumstances outside of the inmate's ability to control or even influence, the Eleventh Circuit held that the retroactive denial of those early release credits violated the Ex Post Facto Clause. *Id.* In so holding, the court found irrelevant to the ex post facto

If the prospect of possible acquisition of early release credits for good behavior is not too speculative to undergird reasonable expectations of early release, neither is the award of provisional credits due to prison overcrowding. *Cf. Weaver*, 450 U.S. at 24 (invalidating Florida law that retroactively reduced amount of "gain-time" early release credits a prisoner could earn). Moreover, while the award of administrative and provisional release credits was indeed contingent on prison overcrowding, the burgeoning Florida prison population at the time of petitioner's plea and sentencing made the award of these credits a near certainty.[34] To the extent that it was rational for petitioner and his lawyer to consider the possibility of early release for good behavior, *see id.* at 32, it was equally rational for them to factor into their calculations the probability of acquiring provisional credits.[35] Thus, the retroactive application of the

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inquiry the question of the likelihood that an inmate would obtain early release due to the award of incentive gain-time. *Id.* at 1500.

[34] Since 1980, the Florida Department of Corrections had been under court order to reduce the Florida prison population. *See Costello* v. *Wainwright*, 489 F. Supp. 1100 (M.D. Fla. 1980). Less than a month before petitioner pleaded *nolo contendere* and was sentenced, the number of inmates in Florida's state prisons exceeded 98 percent of capacity, the statutory trigger for authorization of provisional release credits. *See* Mark Dykstra, *Apart from the Crowd: Florida's New Prison Release Program*, 14 Fla. St. U. L. Rev. 779 (1986). Writing in 1986, Dykstra stated that "[the] prison population problem in Florida is an issue that will not go away." *Id.* at 809.

[35] Petitioner's choices over the six months between late 1985 and early 1986, encompassing his crime, plea, and sentencing for attempted murder, were made against a backdrop of penal law and a corrections system that relied heavily on statutorily-prescribed early release credits to reduce prisoners' actual time of incarceration. In combination with statutory provisions defining the applicable sentence for the crime, petitioner could reasonably consider the availability of early release credits as an important element of his assessment of the possible punishment and in his decision to plead

1992 Act closed a previously available avenue of early release, and defeated Mr. Lynce's reasonable expectations, without the constitutionally required fair warning. *Id.* at 28-31.

II. THE COURT BELOW ERRONEOUSLY CHARACTERIZED § 944.277 AS A PROCEDURAL LAW.

The district court's order denying Mr. Lynce's petition for a writ of habeas corpus relied almost exclusively on the Eleventh Circuit's decision in *Hock* v. *Singletary*, 41 F.3d 1470 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 715 (1996). The Eleventh Circuit affirmed the district court without opinion, apparently relying on *Hock* as well.[36] In *Hock*, the Eleventh Circuit held that laws rendering a convicted murderer retroactively ineligible for control release did not violate the Ex Post Facto Clause. *See id.* at 1471-73. In a short opinion, the court reasoned that the Ex Post Facto Clause was not implicated because the control release law was "procedural" in nature and, therefore, did not affect the quantum of punishment attached to the crime.[37] *See id.* at 1472. This holding was erroneous.

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nolo contendere. *Cf. Eady* v. *Florida*, 622 So. 2d 61 (Fla. 1st Dist. Ct. App. 1993) (per curiam) (misinformation provided by counsel regarding effect of provisional release credits on length of incarceration constitutes ineffective assistance of counsel).

[36] The Eleventh Circuit decided *Hock* several months before this Court's *Morales* decision. Therefore, *Hock* did not benefit from this Court's most recent teaching on the Ex Post Facto Clause. This Court recently vacated a decision of the Florida Supreme Court involving similar issues, and remanded the case to the Florida Supreme Court for further consideration in light of *Morales*. *See Calamia* v. *Singletary*, 115 S. Ct. 1995 (1995) (mem.). *Hock*, in turn, relied in large part on pre-*Morales* decisions of the Florida Supreme Court. It is not clear that the Eleventh Circuit or the Florida Supreme Court would reach the same conclusion regarding the issues presented in *Hock* after *Morales*.

[37] The court alternatively held that control release was too contingent on prison overcrowding to support a reasonable expectation of reduced punishment. *See Hock*, 41 F.3d at 1472-73.

A. The 1992 Act Is Not a Procedural Law, Because It Increased the Punishment Attached to Certain Crimes.

To be sure, the protections of the Ex Post Facto Clause were not intended "to limit the legislative control of . . . modes of procedure which do not affect matters of substance." *Beazell* v. *Ohio*, 269 U.S. 167 (1925). In the ex post facto context, this Court has assigned the word "procedural" a clear meaning: procedural changes are those that produce "no change in the quantum of punishment attached to the crime." *Dobbert* v. *Florida*, 432 U.S. 282, 294 (1977). In stark contrast, the 1992 Act directly resulted in the arrest and re-incarceration of petitioner and the addition of several years to his punishment. This undeniable increase in punishment attached to petitioner's crime precludes characterization of the 1992 Act as merely procedural. *See id.* at 293-94.

The substantive nature of the 1992 Act is even more clear when it is compared with laws which this Court has found to be procedural. The statute in *Beazell* presents a clear example of a procedural law. There, the Court held that a law authorizing for the first time the joint trial of persons jointly indicted for a felony was procedural, because it affected only the manner in which the trial would be conducted and not the definition of the crime or the extent of the punishment. *See Beazell*, 269 U.S. at 170. *Collins* v. *Youngblood*, 497 U.S. 37 (1990), presented a challenge to a statute authorizing an appellate court to reform the defective judgment of a trial court by deleting a fine not authorized by statute, without granting an entirely new trial as required by prior law. In holding that the law was procedural, the Court stated that "it is logical to think that the term ["procedural"] refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Id.* at 45. Finally, the Court in *Dobbert* held that a law that altered the division of labor between judge and jury in capital trials was procedural,

because it "simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." 432 U.S. at 293-94.

By contrast, statutes that retroactively enhance the severity of a crime for purposes of determining its punishment are not procedural. In unanimously striking down a retroactive change in the Florida sentencing guidelines, this Court distinguished the case before it from *Dobbert*:

> The 20% increase in points for sexual offenses in no wise alters the method to be followed in determining the appropriate sentence; it simply inserts a larger number into the same equation.

Miller v. *Florida*, 482 U.S. 423, 433-34 (1987).

Likewise, in the instant case, the 1992 Act left untouched the *procedures* for determining whether inmates not excluded by the statute would be granted provisional release credits. The award of such credits remained contingent on maintaining the same behavior record necessary for good behavior credits and upon the size of the prison population. However, the 1992 Act changed the legal consequences and quantum of punishment attached to particular crimes. Those convicted of attempted murder were declared ineligible for provisional credits *based on the nature of their crimes.* This result is the same as if (as in *Miller*), the legislature had assigned more "offense points" to attempted murder and retroactively excluded those inmates from eligibility for early release credits on the basis of their increased offense points. In the early release context, it is difficult to imagine a clearer example of a substantive change in the penal law.

B. Florida's Purpose in Adopting the 1992 Act Is Irrelevant to the Determination of Whether the Statute Is Procedural.

The Eleventh Circuit's conclusion in *Hock* that changes in the laws governing "control release" credits are procedural rests on the premise that overcrowding credit statutes and amendments were enacted solely to address an "administrative problem." *Hock*, 41 F.3d at 1472. This premise is doubtful and, even if correct, does not determine whether the law is procedural.[38] Relying heavily on the Florida Supreme Court's opinion in *Dugger* v. *Rodrick*, 584 So. 2d 2, 4 (Fla. 1991), *cert. denied sub nom. Rodrick* v. *Singletary*, 502 U.S. 1037 (1992), the *Hock* court emphasized that the purpose of the control release statute was to "address the administrative problem of prison overcrowding, not to confer a benefit on the prison population." *Hock*, 41 F.3d at 1472. However, the fact that a penal law was enacted for administrative convenience has never been held to insulate it from the

[38] *Morales* indicates that the motivation of the enacting legislature is irrelevant to the ex post facto inquiry. *See id.* at 1605. However, even if legislative motivation were relevant, it is doubtful that the Florida Legislature's intent in amending § 944.277 was limited to its administrative concerns regarding prison overcrowding. Any inquiry into legislative intent properly must focus on the changes effected by the 1992 amendment, *i.e.*, the expansion of the list of offense-based exclusions. The motivation of the Legislature in enacting the *original* early release credits program established by § 944.277 is immaterial to this assessment. While the Florida Attorney General erroneously opined that "[t]he statute is not tied to inmate conduct" to support his claim that the 1992 Act was purely administrative, in the very next sentence he referred to the "legislative intent" evident in the 1992 amendment "to remove [inmates convicted of murder offenses] from the pool of eligible inmates." Letter to Secretary Singletary (Dec. 31, 1992) (App. D). Because the 1992 Act rendered selected inmates ineligible for early release credits on the basis of their crimes, any argument that the Florida Legislature enacted the Act purely out of administrative convenience and without regard for substantive issues of punishment stretches credulity.

requirements of the Ex Post Facto Clause. This Court has never wavered from the principle that penal provisions, even when "accorded by the grace of the legislature," are unconstitutional if they operate to increase punishment retroactively. *See, e.g., Weaver*, 450 U.S. at 30-31. The Court's opinion in *Morales* makes clear that the proper focus of the inquiry is on the actual effect of the law on the prisoner's punishment, not on the legislature's motivation for enacting the law. *See Morales*, 115 S. Ct. at 1605.[39]

Incarceration is punishment, and longer incarceration is greater punishment. By withdrawing 1,860 days of provisional credits from Mr. Lynce, the 1992 Act enhanced his punishment by lengthening his term of incarceration. The clear import of the Court's ex post facto decisions is that a statute retroactively effecting such a substantial change in punishment is unconstitutional. Contrary to the command of the Ex Post Facto Clause, the 1992 Act had the intent and effect of singling out a group of offenders—a group that included the Petitioner—and increasing the punishment attached to their crimes after those crimes had been committed.

[39] The Third Circuit understands *Morales* to stand for the proposition that the only relevant inquiry is into the *effect* of the new law on punishment. *See Artway* v. *Attorney General*, 81 F.3d 1235, 1260-61 (3d Cir. 1996) ("The opinion . . . [in *Morales*] spends the bulk of its analysis examining the effect of the legislative change on Morales. . . . In doing so, it concedes that a measure effectively extending a sentence of imprisonment constitutes punishment, presumably regardless of the legislature's motivation.") (internal citation omitted).

CONCLUSION

The judgment of the court of appeals should be reversed and the Petition for Writ of Habeas Corpus should be granted.

Respectfully submitted.

Of Counsel:

CARTER G. PHILLIPS
PAUL A. HEMMERSBAUGH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

H. JAY STEVENS
JOEL T. REMLAND *
Federal Public Defender
Middle District of Florida
80 N. Hughey Avenue
Suite 417
Orlando, FL 32801
(407) 648-6338

Counsel for Petitioner

July 12, 1996

* Counsel of Record

APPENDICES

APPENDIX A

1992 SUPPLEMENT TO FLORIDA STATUTES 1991

944.277 Provisional credits.—

1. Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity, the Secretary of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such condition in writing, the secretary may grant up to 60 days of provisional credits equally to each inmate who is earning incentive gain-time, except to an inmate who:

   a. Is serving a sentence which includes a mandatory minimum provision for a capital offense or drug trafficking offense and has not served the number of days equal to the mandatory minimum term less any jail-time credit awarded by the court;

   b. Is serving the mandatory minimum portion of a sentence enhanced under s. 775.087(2);

   c. [1] Is convicted, or has been previously convicted, of committing or attempting to commit sexual

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[1] Note.—

A. Section 3, ch. 90-186 provides that "[a] person who is convicted, or has been previously convicted, of committing prior to the effective date of this act a lewd or indecent assault or act specified in section 944.277(1)(c), Florida Statutes, is eligible for provisional credits. However, a person who is convicted or has been previously convicted, of committing or attempting to commit a lewd or indecent assault or act as a result of masturbating in public, exposing the sexual organs in a perverted manner, or non-consensual handling or fondling of the sexual organs of another person is not eligible for provisional credits."

B. Section 19, ch. 90-337, provides that "[e]ffective July 1, 1990, an inmate convicted of a lewd or indecent act not listed in s. 944.277(1)(c), Florida Statutes, shall receive retroactive benefit of all provisional credit awards made during the service of his sentence, provided that he is not otherwise ineligible for, or excluded from, receiving such an award." Chapter 90-337 was signed into law on July 3, 1990.

battery, incest, or any of the following lewd or indecent assaults or acts: masturbating in public; exposing the sexual organs in a perverted manner; or nonconsensual handling or fondling of the sexual organs of another person;

d. Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, or aggravated battery, and a sex act was attempted or completed during commission of the offense;

e. Is convicted, or has been previously convicted, of committing or attempting to commit kidnapping, burglary, or murder, and the offense was committed with the intent to commit sexual battery or a sex act was attempted or completed during commission of the offense;

f. Is convicted, or has been previously convicted, of committing or attempting to commit false imprisonment upon a child under the age of 13 and, in the course of committing the offense, the inmate committed aggravated child abuse; sexual battery against the child; or a lewd, lascivious, or indecent assault or act upon or in the presence of the child;

g. Is sentenced, or has previously been sentenced, or has been sentenced at any time under s. 775.084, or has been sentenced at any time in another jurisdiction as a habitual offender;

h. Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, aggravated battery, kidnapping, manslaughter, or murder against an officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); or against a state attorney or

assistant state attorney; or against a justice or judge of a court described in Article V of the State Constitution; or against an officer, judge, or state attorney employed in a comparable position by any other jurisdiction; or

i. Is convicted, or has been previously convicted, of committing or attempting to commit murder in the first, second, or third degree under s. 782.041 (1), (2), (3), or (4); or has ever been convicted of any degree of murder in another jurisdiction; or

j. Is serving a concurrent sentence in another state or federal jurisdiction.

In making provisional credit eligibility determinations, the department may rely on any document leading to or generated during the course of the criminal proceedings involving the inmate, including, but not limited to, any presentence or postsentence investigation or any information contained in arrest reports relating to circumstances of the offense.

2. The secretary's authority to grant provisional credits in increments not exceeding 60 days will continue until the inmate population of the correctional system reaches 97.5 percent of lawful capacity, at which time the authority granted to the secretary will cease, and the secretary shall notify the Governor in writing of the cessation of such authority.

3. At such time as provisional credits are granted, the Department of Corrections shall establish a provisional release date for each eligible inmate incarcerated, which will be the tentative release date less any provisional credits granted.

4. Any eligible inmate who is incarcerated on the effective date of an award of provisional credits shall receive such credits. Any inmate who is under any

type of release program of the department is not eligible for an award of provisional credits.

5. Any inmate who is serving one or more sentences of imprisonment imposed as a result of an offense that occurred on or after July 1, 1988, who receives 30 or more days of provisional credits, and who is not required to be released only under conditional release supervision pursuant to ss. 944.291 and 947.1405 must be released into the provisional release supervision program on his provisional release date, unless such inmate is also serving a sentence for an offense that occurred before July 1, 1988. The department shall contract with public or private organizations for the delivery of basic support services while an inmate is in the provisional release supervision program. Support services shall include, but not be limited to, substance abuse counseling, temporary housing, family counseling, and employment support programs. Inmates who are released into the provisional release supervision program are not eligible for any additional gain-time. If an inmate has received a term of probation, community control supervision, conditional release supervision, or control release supervision to be served after his release from incarceration, the period of probation, community control supervision, conditional release supervision, or control release supervision must be substituted for the period of supervision under the provisional release supervision program.

6. The terms and conditions of provisional release supervision must be specified in writing, and a copy must be given to the inmate at the time of his release from incarceration. If the inmate's conviction was for a controlled substance violation, the conditions shall include a requirement that the inmate submit to random substance abuse testing intermit-

tently through the term of supervision, upon the direction of the correctional probation officer as defined in s. 943.10(3). The term of supervision must be equal to the number of provisional credits accrued, but may not exceed 90 days unless extended as provided in subsection (7).

7. If an inmate violates any term or condition of provisional release supervision, the Department of Corrections may take any of the following action:

   a. Continue provisional release supervision.

   b. Extend the term of supervision not to exceed the total number of provisional credits the inmate has accumulated.

   c. Terminate the provisional release supervision and return the inmate to prison. If an inmate is returned to prison, credits accumulated as of the date of release to the provisional release supervision program may be canceled as prescribed by department rule.

8. If an inmate absconds from provisional release supervision, the Department of Corrections may issue a warrant for his arrest as provided by s. 944.405. The failure of an inmate to report to the designated parole and probation office within 10 days after his release from incarceration constitutes a violation of the provisional release supervision program and will result in issuance of a warrant for arrest of the inmate.

9. The Department of Corrections shall adopt rules to implement the provisional release supervision program.

History.—s. 5, ch. 88-122; s. 4, ch. 89-100; s. 5, ch. 89-526; s. 5, ch. 89-531; s. 2, ch. 90-77; s. 1, ch. 90-186; s. 14, ch. 90-337; s. 14, ch. 91-280; s. 12, ch. 92-310.

APPENDIX B

[Relevant Excerpts Only—Full Document Lodged with the Court]

AGO 92-96—DECEMBER 29, 1992

CORRECTIONS, DEPARTMENT OF—INMATES—GAIN-TIME

AWARD OF PROVISIONAL CREDITS TO INMATES CONVICTED OF CERTAIN OFFENSES

To: The Honorable Gary Siegel, Senator, District 12; The Honorable Norman R. Wolfinger, State Attorney, Eighteenth Judicial Circuit; Mr. Harry K. Singletary, Jr., Secretary, Department of Corrections

You recognize that there is great concern in Central Florida regarding the impending release of Donald Glenn McDougall who was convicted of second degree murder and aggravated child abuse. The Department of Corrections has calculated provisional release credits under s. 944.277, F.S. (1992 Supp.), for McDougall which would dramatically reduce the time he must serve under his original sentence.[1] There is concern, however, that the provisions of s. 944.277, F.S. (1992 Supp.) were not intended to operate to permit the early release of convicted felons such as McDougall. You, therefore, ask my opinion regarding the interpretation of s. 944.277, F.S. (1992 Supp.).

While your concern regarding the impending release of McDougall prompted your inquiries to this office, the

[1] This office has been advised by the Department of Corrections that since January 1991, the provisions of s. 947.146, F.S., creating a controlled release program, have been used to regulate the prison population. However, McDougall's scheduled release is based upon a calculation of provisional credits pursuant to s. 944.277, F.S.

questions you pose are general in nature and may be substantially stated as follows:

QUESTIONS: . . .

* * * *

3. Does s. 944.277(1)(i), F.S. (1992 Supp.), prohibit provisional credits being awarded to an inmate convicted of murder?

SUMMARY: . . .

* * * *

3. Section 944.277(1)(i), F.S. (1992 Supp.), prohibits provisional credits being awarded to an inmate who has been convicted of murder, regardless of when such conviction occurred.

AS TO QUESTION 3:

Section 944.277(1)(i), F.S. (1992 Supp.), prohibits the awarding of provisional credits to an inmate who has been convicted of murder.[2] The prohibition was added to s. 944.277 by Ch. 89-100, Laws of Florida. In so amending the statute, the Legislature did not set forth the entire text of subsection (1) but only the newly created paragraphs (h) and (i) as amendments to that subsection.[3] Section 6 of Ch. 89-100 provided that the act took effect January 1, 1990, and would apply to offenses committed on or after the effective date. The Division of Statutory Revision, in compiling the 1989 Florida Statutes, appended a footnote to s. 944.277(1)(h) and (i), recognizing that the provisions of those para-

[2] *See*, s. 944.277(1)(i), F.S. (1992 Supp.), prohibiting the award of provisional credits to an inmate who:

> Is convicted, or has been previously convicted, or committing or attempting to commit murder in the first, second, or third degree under s. 728.04(1), (2), (3), or (4); or has ever been convicted of any degree of murder in another jurisdiction. . . .

[3] *See*, s. 4, Ch. 89-100, Laws of Florida.

graphs applied only to offenses committed on or after January 1, 1990.

Section 944.277(1), F.S. 1989, was amended by Ch. 90-186, Laws of Florida, which set forth the entire text of the subsection. Section 4 of Ch. 90-186, Laws of Florida, stated that the act "shall take effect October 1, 1990, and shall apply to offenses committed on or after the effective date." The reference to s. 944.277(1) in the 1991 Florida Statutes notes that subsection (1) applies to offenses committed on or after October 1, 1990; the footnote to paragraphs (h) and (i) which had been contained in the 1989 Florida Statutes was deleted.

The 1992 Legislature again amended subsection (1) of s. 944.277, F.S., setting forth the entire text of the subsection in s. 12, Ch. 92-310, Laws of Florida. In prescribing an effective date, however, the act contained no restriction on the subsection's application to offenses committed after a certain date. The 1992 Supplement to the Florida Statutes does not recognize any such limitation for any provision of subsection (1).

As noted *supra*, s. 944.277, F.S., establishes the procedures to be used by the Department of Corrections to reduce the prison population and is not a substantive matter of punishment or reward. Statutes relating to remedies or procedures operate retrospectively.[4] Thus, absent a limitation, s. 944.277, F.S., as a procedural statute, applies retroactively. The courts have expressly recognized that the statute may be retroactively applied.[5] It was thus necessary for the Legislature in 1989 and 1990 to impose a limitation in order for the provisions of subsection (1) to operate prospectively only.[6]

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[4] Fogg v. Southeast Bank, N.A., 473 So.2d 1352 (4.D.C.A. Fla., 1985).

[5] *See*, Dugger v. Rodrick, *supra*.

[6] *Cf.* Dominquez v. State, 17 F.L.W. D1853, 1854 (1 D.C.A. Fla., filed July 29, 1992), recognizing that in order for the statute to be applied prospectively only, a specific proviso for offenses occurring after a certain date was needed. I am not unmindful that in that case the court held erroneous the interpretation given by the Department of Corrections that s. 944.277(1)(i) excluded murderers from receiving provisional credits who had committed any criminal offense after January 1, 1990, and had a prior murder conviction. The court stated that the statute disqualified murderers who committed a murder after January 1, 1990. The court, however, was interpreting the provisions of s. 944.277, F.S. 1989, and not the subsequent amendments to the statute in 1990 and 1992, and, thus, the court's decision would appear to be of limited application.

Such a limitation, however, was not imposed with the amendment of subsection (1) in 1992, and absent such a limitation, the provisions of that subsection would apply retroactively. Such a construction is consistent with the position which appears to have been taken by the Division of Statutory Revision, which is responsible for facilitating the correct and proper interpretation of the Florida Statutes.[7]

Accordingly, I am of the opinion, until legislatively or judicially determined otherwise, that s. 944.277(1)(i), F.S. (1992 Supp.), prohibits provisional credits being awarded to an inmate who has been convicted of murder, regardless of when such offense occurred.

* * * *

In summary, therefore, inasmuch as McDougall was convicted of murder in the second degree, he would appear to be precluded from receiving provisional credits pursuant to s. 944.277(1)(i), F.S. (1992 Supp.). Moreover, if the Secretary of Corrections determines that McDougall was convicted of aggravated child abuse with battery or aggravated battery as an element of that offense and that a sex act was attempted or committed during the commission of that offense, he would be precluded from receiving provisional credits pursuant to s. 944.277(1)(d), F.S. (1992 Supp.).

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[7] *See*, s. 11.242, F.S.

APPENDIX C

[FLORIDA DEPARTMENT OF CORRECTIONS LETTERHEAD]

December 30, 1992

The Honorable Robert A. Butterworth
Attorney General
Office of the Attorney General
The Capitol
Tallahassee, Florida 32399-1050

Dear General Butterworth:

The Department of Corrections has reviewed the opinion issued on December 29 in response to the questions submitted by the Department, Senator Siegel and State Attorney Wolfinger. A portion of the opinion issued in response to a question which I understand was submitted by State Attorney Wolfinger raises additional questions which require clarification before the Department may fully determine the impact of the opinion and apply it appropriately.

As you are aware, the specific question relating to the possible retrospective exclusion of murders under the amendments to Section 944.277(1)(i) and later statutory enactments was not initiated by the Department, due to the opinion of the First District Court of Appeal in *Dominquez v. State,* 17 F.L.W. D1853 (Fla. 1st DCA, July 29, 1992). The opinion issued on December 29 indicates that the *Dominquez* opinion has limited application. The Department has not seen the question submitted by State Attorney Wolfinger and, therefore, did not have benefit of the information, if any, accompanying the question. Thus, the Department does not know the full foundation upon which the opinion may be based. For this reason, the Department submits the questions at the end of this letter in connection with the opinion

issued on December 29 to be sure of the full import of the opinion prior to its application.

Preliminarily, I note the following. In two places within the opinion, you state that the Department has "calculated" provisional release credits under s. 944.277 (see page 1 and footnote 1). The Department was contacted yesterday by defense counsel who represent offenders in this area of the law regarding this language and whether the opinion would require the voiding of provisional credits. They argue that the Department has not merely calculated provisional credits but has granted and awarded a total of 1860 credits between July 1, 1988 and January 18, 1991; the date of the last award of credits following implementation of control release under s. 947.146. The application of these credits was made under s. 944.277(4).

The initial summary of the opinion, the final paragraph of the response to questions three, and the closing paragraph of the opinion all indicate that the amendments to s. 944.277(1)(i) now preclude the award of provisional credits under that section; however, the opinion does not make clear whether credits *previously* granted are subject to being voided or whether the retrospective effect of the amendments is accomplished through the denial of future credits to all inmates who formerly were eligible for provisional credits. The final summary paragraph of the opinion indicates that "inasmuch as McDougall was convicted of murder in the second degree, he would appear to be precluded from receiving provisional credits pursuant to s. 944.277(1)(i), F.S. (1992 Supp.)." Since all the awards of provisional credits granted and applied to reduce Mr. McDougall's overall release date were made on or prior to January 18, 1991, the only way to preclude the release of McDougall [1] and other similarly situated offenders is to void credits previously granted.

---

[1] The Department notes that McDougall's credits have already been voided on the basis of other portions of the opinion issued on December 29, 1992, related to his conviction for aggravated child abuse.

Defense counsel also pointed out that while the decisions of The Supreme Court of Florida in *Dugger v. Rodrick*, 584 So.2d 2 (Fla. 1991), *cert. denied*, 112 S.Ct. 885 (1992), and *Dugger v. Grant*, 17 F.L.W. S744 (Fla., December 10, 1992),[2] confirm that the early release mechanism under Section 944.277 is remedial in nature and do not create any substantive or procedural "liberty" due process rights, these decisions do not appear to specifically address whether an inmate may have a vested right to retain credits which have already been granted and applied to his release date. *See*, § 944.277(4), Fla. Stat. (1991) ("[a]ny eligible inmate who is incarcerated on the effective date of an award of provisional credits shall receive such credits"); *cf. Waldrup v. Dugger*, 562 So.2d 687, 694-695 (Fla. 1990) (gaintime statutes do not create vested rights until gain-time actually is awarded). Furthermore, defense counsel contend that the only statutory authority given the Department to void or cancel credits appears in s. 944.277(7)(c). The Department advised defense counsel that a clarification of the opinion was to be requested as to the question of cancellation of the credits and that these concerns would be brought to your attention.

With this background, the Department now seeks clarification of the opinion issued on December 29, 1992:

> Do the 1992 amendments to s. 944.277(1) as discussed in Question Three of the December 29 opinion require that the Department void or cancel provisional credits previously given to offenders now excluded by s. 944.277(1)(i)?
>
> If so, is the cancellation or credits limited only to those offenders who were in custody on July 6, 1992, the effective date of the 1992 amendments, or must the cancellation be extended to those released prior

[2] The Department notes that the *Grant* decision is not yet final as a motion for rehearing has been filed and remains pending.

> to that date but still under supervision by the Department on that date?
>
> If cancellation of credits extends to those offenders still under supervision on July 6, 1992, and an offender has since completed supervision, must that offender be returned to custody to complete service of the sentence remaining after cancellation of credits?
>
> If cancellation of credits is mandated for all offenders in custody on July 6, 1992, and the Department released an offender affected by s. 944.277(1)(i) for expiration of sentence or to supervision on or after July 6, 1992, because of application of provisional release credits prior to January 19, 1991, must that offender be returned to custody to serve the balance of the sentence remaining after cancellation of credits?
>
> Is an offender who must be returned to custody following cancellation of credits entitled to credit for time out of custody under the principles of *Sutton v. Department of Corrections*, 531 So.2d 1009 (Fla. St. DCA 1988) and *Carson v. State*, 489 So.2d 1236 (Fla. 2d DCA 1986).

On December 31, 1992, the Department is scheduled to release offenders impacted by s. 944.277(1)(i) who previously received provisional credits under earlier eligibility periods.

Because of these impending releases, the Department respectfully asks that your office give expedited consideration to this clarification request.

Sincerely,

/s/
Harry K. Singletary, Jr.
Secretary

cc: Louis A. Vargas, General Counsel

APPENDIX D

[STATE OF FLORIDA LETTERHEAD]

December 31, 1992

Mr. Harry K. Singletary, Jr.
Secretary
Department of Corrections
2601 Blairstone Road
Tallahassee, Florida 32399-2500

Dear Secretary Singletary:

In light of this office's opinion in AGO 92-96, you ask additional questions about the department's responsibilities under s. 944.277 F.S. (1992 Supp.). Your questions may be summarized as follows:

> 1) In light of the 1992 amendments to s. 944.277 (1), F.S. (1992 Supp.), are inmates convicted of murder who are currently in the custody of the Department of Corrections eligible for release regardless of when the administrative calculation of provisional credits pursuant to s. 944.277 was made?
>
> 2) Must the Department of Corrections recommit inmates convicted of murder who have been released after July 6, 1992, by the department based in part on the department's calculation of provisional credits?

As your questions are interrelated, they will be answered together.

As discussed in AGO 92-96, the Legislature, with the 1992 amendment of s. 944.277(1), F.S., has manifested its intent that murderers are precluded from receiving provisional credits, regardless of when such conviction occurred. While you have referred to s. 944.277(4), F.S. (1992 Supp.), which states that eligible inmates shall receive provisional credits, that provision does not alter the above conclusion. The Supreme Court of Florida has recognized that the award of provisional credits under s. 944.277, F.S., is strictly an administrative mechanism to relieve prison overcrowding and is permissive rather than mandatory.[1] The statute is procedural only. As the Court made clear in the broad language of its recent decision in Dugger v. Grant,[2] inmates possess no vested or substantive right to be released under this program.

Thus, provisional credits previously authorized thereunder may be withdrawn, modified or denied by subsequent legislation.[3] Calculation of provisional credits prior to 1991 does not preclude the Legislature from modifying the statute to prohibit the release of certain offenders under this program since the exclusive purpose of the program is to relieve prison overcrowding. The statute is not tied to inmate conduct.

The amendment of the statute in 1992 manifests a legislative intent to remove these offenders from the pool of eligible inmates. Therefore, I am of the opinion that an inmate who has been convicted of murder and is in custody on or after July 6, 1992, is no longer eligible for release based upon an administrative calculation of provisional credits pursuant to s. 944.277, F.S. (1992 Supp.), regardless when such calculation was made.

While I am not aware of, nor have you drawn my attention to, any Florida court decision which compels the department to recommit inmates released after July 6,

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[1] *See, e.g.*, Dugger v. Rodrick, 584 So.2d 2 (Fla. 1991), *cert. denied*, 112 S.Ct. (1992).

[2] 17 F.L.W. S744, 746 (Fla., filed December 10, 1992), *pet. for rehearing pending*.

[3] Dugger v. Rodrick, *supra*, in which the Court held that the retroactive application of the inmate population control statute, as a procedural rather than substantive law, is not an ex post facto law, even though it may work to the disadvantage of the prisoner.

1992, the department retains jurisdiction over a prematurely released prisoner so long as his sentence has not expired.[4] The department as an administrative agency, however, must act in accordance with statutory directives.[5] The early release of an inmate without statutory authority does not excuse the inmate from serving the balance of his or her sentence and he or she may be recommitted by prison authorities unless judicially or legislatively determined otherwise.[6]

I trust that the above comments may be of some assistance to the Department of Corrections in meeting its statutory duties.

Sincerely,

/s/
Robert A. Butterworth
Attorney General

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[4] *See,* Carson v. State, 489 So.2d 1236 (2 D.C.A. Fla. 1986) (when an inmate is released or discharged from prison by mistake, he may be recommitted if his sentence would not have expired had he remained in confinement). When an inmate is released from prison by mistake, his sentence continues to run in the absence of some fault on his part. Sutton v. Department of Corrections, 531 So.2d 1009 (1 D.C.A. Fla., 1988). Thus an inmate recommitted by the department is entitled to credit for the time he spent at liberty.

[5] *See, e.g.,* Schiffman v. Department of Professional Regulation, Board of Pharmacy, 581 So.2d 1375 (1 D.C.A. Fla., 1991) (administrative agency has only that authority which the Legislature has conferred by statute); City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493 (Fla. 1973).

[6] *See, e.g.,* Johnson v. State, 561 So.2d 1254 (2 D.C.A. Fla., 1990) (fact an inmate was mistakenly released from custody before serving a prison sentence did not terminate that sentence); Green v. Christiansen, 732 F.2d 1397, 1400 (9 Cir. 1984).

QUESTION PRESENTED

During the years 1988-1993, when prison population reached statutorily set limits, Florida awarded inmates such as the petitioner provisional credits, a form of "gain time" intended solely to relieve prison overcrowding by reducing inmates' sentences. Between 1988 and 1991, the petitioner was given 1,860 days of provisional credits. Then, in 1992, the Florida Legislature revoked all provisional credits given to inmates like the petitioner, who had been convicted of violent crimes. Question: whether that revocation violated the ex post facto clause of the U.S. Constitution.

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are:

1. The petitioner, Kenneth Lynce.
2. Robert A. Butterworth, Florida Attorney General, respondent.
3. Hamilton Mathis, superintendent of Tomoka Correctional Institution, respondent.
4. Harry K. Singletary, secretary of the Florida Department of Corrections, respondent.

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In the Supreme Court of the United States

October Term 1995

No. 95-7452

KENNETH LYNCE,

Petitioner,

v.

HAMILTON MATHIS, ROBERT A. BUTTERWORTH
AND HARRY K. SINGLETARY,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT ROBERT A. BUTTERWORTH

STATEMENT OF THE CASE

This case began as a petition for a writ of habeas corpus challenging Florida's cancellation of 1,860 days of "provisional credits" given to a Florida prison inmate. These credits, if used by a prison inmate, can result in early release from sentence. They are widely regarded as a form of "gain time," a term for a variety of early release mechanisms, some of which are given to inmates as a means of behavior control. The particular type of gain time at issue in this action, however, had a special purpose: to enable state prison officials to prevent prison overcrowding

and to keep state prison populations under a cap mandated by a federal consent decree.

The petitioner is a prisoner in the custody of the Florida Department of Corrections (DOC). The respondents are the Florida Attorney General and two state prison officials responsible for operating a prison system that grew rapidly during the 1970s and 1980s to become one of the largest in the United States.

By October 1992, the petitioner had accumulated 1,860 days of these provisional or "overcrowding" gain time credits and was released. DOC released the petitioner and others like him based on its initial interpretation of 1992 amendments to the overcrowding gain time law that the petitioner retained the ability to use accumulated overcrowding gain time to secure early release. However, in December 1992, the Florida Attorney General determined that the 1992 Florida Legislature in fact had intended retroactively to revoke the petitioner's accumulated overcrowding gain time, an interpretation of the statute later upheld by the Florida Supreme Court. Because the petitioner had been unlawfully released, still having time remaining on his sentence, he was taken back into state custody.

On petition for a writ of habeas corpus alleging an ex post facto violation, the U.S. District Court for the Middle District of Florida (adopting the report and recommendation of a magistrate judge) determined that, in fact, the Florida Legislature's revocation of the petitioner's overcrowding gain time did not violate the U.S. Constitution's ex post facto clause.

The Eleventh Circuit Court of Appeals denied review.

This Court granted the petitioner's petition for a writ of certiorari in May 1996 to determine one question: whether the 1992 legislative cancellation of the petitioner's overcrowding gain time violated the ex post facto clause.

1. Overcrowding Gain Time — an Exercise in Prison Crisis Management.

During the 1970s and 1980s, the Florida prison system found itself under pressure from two directions. First, rising crime rates and increased in-migration drove up the number of crimes committed in the state and, therefore, the number of people sentenced to state prison by state courts. During the 1970s, state prison populations grew more rapidly than the state could build facilities to house them. For instance, between June 30, 1971, and May 12, 1975, the state prison population in creased by 43 percent, from 9,530 inmates to 13,700. *See Costello v. Wainwright*, 397 F.Supp. 20, 31 n. 9. (M.D. Fla. 1975), *aff'd* 525 F.2d 1239 (5th Cir. 1976). The DOC secretary three times temporarily closed the state prison system to new admissions. *Id.*, 397 F.Supp. at 31. During this period, the department temporarily housed inmates in tents at Florida's then-main prison at Starke. *Id.*, 397 F.Supp. at 22. The inmate population continued to rise, and as of August 21, 1996, there were 64,082 inmates in the Florida prison system — an increase of 570 percent over the number in June 1971.

Second, the state faced judicial pressure as well. Until this Court's decision in *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), it was widely assumed that prison overcrowding was a per se constitutional violation. Consequently, many inmate plaintiffs were quick to file civil rights actions alleging overcrowding. Florida was the target of such a lawsuit, and in 1975, finding that overcrowding threatened inmates' health and led to increased violence, the U.S. District Court for the Middle District of Florida issued a preliminary injunction ordering Florida to reduce its prison population. *Costello v. Wainwright*, 397 F.Supp. at 38.

Costello was a significant overcrowding case. Although it began in 1972 as a pro se challenge to the alleged failure to provide adequate medical and mental health care, it was amended to become an overcrowding class action after the district court appointed counsel to represent the plaintiffs. In 1979, the parties entered into a consent decree providing for a cap on inmate populations, which remained in place through

judicial order until 1993. *See Celestineo & Costello v. Dugger*, 147 F.R.D. 258, 264 (M.D. Fla. 1993).[1] This cap limited inmate populations based on square footage of living space per inmate bed. As part of the *Costello* termination process, the Legislature enacted the consent decree limitations into law. See note to s. 944.023, Florida Statutes (Supp. 1992).

Florida's first response to the *Costello* injunction was to build more prison beds. By June 1982, however, the problem of prison population growth had become so acute that the Florida Governor called a special legislative session to deal with it. During that session, the Florida Legislature appropriated additional prison building and operating funds, and ordered the creation of a task force to find other ways to keep inmate populations under the cap imposed by the *Costello* consent decree. Lodg. Doc. 76.

Among other things, the task force made three significant public policy recommendations. First, it proposed the creation of a system of sentencing guidelines. It was thought that, by making sentences more uniform, prison population growth could be more easily estimated. Second, the task force proposed changes to Florida's basic gain time statute, s. 944.275, Florida Statutes, which serves as a behavior management tool, again with the aim of making population growth more predictable. Lodg. Doc. 73, 112-113. Finally, the task force proposed the creation of an early release mechanism that would act as a "safety valve" in case the prison population could not be brought under control or predicted accurately. Lodg. Doc. 75.

In the years that followed, the Florida Legislature experimented with four "safety valve" overcrowding mechanisms. They were:

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[1] This is the same case as *Costello v. Wainwright*. The order cited terminated the case after 21 years, 14 of them under consent decrees.

- ***Emergency Release*** — Enacted in 1983,[2] this statute authorized the emergency release of inmates based on incremental reductions in gain time when overall prison populations reached 98 percent of capacity. See s. 944.598, Florida Statutes (1985). The statute did not condition access to credits based on the nature of the inmate's offense. Despite language that appears mandatory, Florida never granted inmates emergency release credits or released anyone pursuant to this statute. *Blankenship v. Dugger*, 521 So.2d 1097, 1098 (Fla. 1988).[3] After remaining on the books unused, the emergency release statute was repealed in 1993. Sec. 32, chapter 93-406, Laws of Florida.
- ***Administrative gain time*** — Enacted in 1987, administrative gain time provided that "Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity as defined in s. 944.598, the secretary of the Department of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such certification in writing, the secretary may grant up to a maximum of 60 days administrative gain-time equally to all inmates who are earning incentive gain-time, unless such inmates" were serving sentences for a short list of offenses. See s. 944.276, Florida Statutes (1987). The Legislature, however, repealed this section the following year, 1988, and

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[2] Sections 3 and 5, chapter 83-131, Laws of Florida.

[3] As of March 10, 1988, the date of the *Blankenship* opinion, neither DOC nor the Governor had "ever taken the steps necessary to activate the reduction of sentences under this section." This means that the petitioner never received emergency release credits. By March 1988, the second experiment in overcrowding gain time, known as administrative gain time, had been in place almost a year. *Id.* The petitioner received administrative gain time but does not challenge its cancellation in this case.

replaced it with provisional credits. Sections 5 and 6, chapter 88-122, Laws of Florida.

- ***Provisional Credits*** — Enacted in 1988,[4] s. 944.277, Florida Statutes, began with language almost identical to that in the repealed administrative gain time statute:

> Whenever the inmate population of the correctional system reached 97.5 percent of lawful capacity as defined in s. 944.096, the Secretary of the Department of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such condition in writing, the secretary may grant up to 60 days of provisional credits equally to each inmate who is earning incentive gain-time, except an inmate who . . ."

was serving a longer list of offenses than set out in the administrative gain time statute. The Florida Supreme Court saw no practical distinction between administrative gain time and provisional credits other than the name change. "The sole purpose of both was to reduce prison overcrowding when the correctional system reached ninety-eight percent of its lawful capacity." *Griffin v. Singletary*, 638 So.2d 500, 501 (Fla. 1994).

In 1989, the Legislature removed inmates convicted of murder and murder-related offenses from eligibility for provisional credits but did not revoke credits already distributed.

In 1992, balancing public safety concerns against the need for administrative flexibility to respond to overcrowding, the Legislature revoked all provisional "overcrowding" credits granted to the petitioner and others convicted of murder or murder-related offenses. See 1992 Op. Atty. Gen. Fla. 092-96 (December 29, 1992); *Griffin v. Singletary*, 638 So.2d 500 (Fla. 1994); *Waite v. Singletary*, 632 So.2d 192 (Fla. 3d DCA 1994).[5][6]

In 1993, the Legislature repealed s. 944.277 and canceled all previously granted administrative and provisional "overcrowding" credits. Sec. 32 and 35 chapter 93-406, Laws of Florida; section 944.278, Florida Statutes (1993).

- ***Control Release*** — Enacted in 1989,[7] s. 947.146, Florida Statutes, authorizes release from incarceration rather than decreases in sentence to control prison population. It works more like parole than gain time and cannot be considered a "gain time" measure. It also is the only population control mechanism to survive the experimentation of the 1980s and early 1990s.

These overcrowding relief mechanisms, particularly administrative gain time and provisional credits, should not be confused with "good time," or basic, gain time found in s. 944.275, Florida Statutes. Basic gain time was the type at issue in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). In *Weaver*, this Court concluded that basic gain time was part of the punishment or sentence and any reduction in its

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[4] Section 5, chapter 88-122, Laws of Florida.

[5] Florida's cancellation of release credits, after publication of a state attorney general's opinion that granting them was unlawful, is not an isolated phenomenon. The same situation occurred in *Stephens v. Thomas*, 19 F.3d 498 (10th Cir. 1994); *cert. denied*, — U.S. —, 115 S.Ct. 516, 130 L.Ed.2d 422 (1994)

[6] The petitioner implies (and one amicus argues) that the Attorney General's interpretation was wrong and that the Court should examine its correctness. However, that would be inappropriate. In *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), this Court said that, in a habeas corpus case, it was bound by the state court's interpretation of state statutes.

[7] Section 2, chapter 89-526, Laws of Florida

availability "had the purpose and effect of enhancing the range of available prison terms." *California Department of Corrections v. Morales*, — U.S. —, 115 S.Ct. 1597, 1602 (1995). Basic gain time, however, becomes part of the sentence because it operates differently from overcrowding gain time. Florida law provides that basic gain time comes off the top of the inmate's sentence upon arrival at the Florida DOC. Prison officials have no discretion whether to immediately grant this sort of gain time; its award is automatic. See *Weaver*, 450 U.S. at 26; s. 944.275(4)(a), Florida Statutes. And it can be taken away only for specific reasons. Sections 944.275(5)[8] and 944.278[9], Florida Statutes.

In contrast, overcrowding credits were not automatically awarded. Instead, they became available only upon the occurrence of an unpredictable and arbitrary event unrelated to the petitioner's original crime or his behavior in prison — the prison population exceeding a threshold percentage of system capacity. Whether the prison population hit the threshold depended on three factors, all of which are beyond the control of prison officials: 1) the rate of judicial commitments to prison, 2) the rate of discharges from prison based on normal completions of sentences (as defined by the sentencing order and basic gain time) and parole, and 3) the rate of prison construction. Even when populations hit the threshold, prison officials retained discretion in granting "overcrowding" gain time. For instance, the Governor could decline to acknowledge the DOC secretary's certification under the administrative and provisional release statutes. Under both such statutes, the

[8] Such as the failure to comply with the department's rules.

[9] Basic gain time is forfeited for escape or an attempt to escape, parole revocation, assault, threatening or knowingly endangering another's life, refusing to carry out an instruction, neglecting to perform a duty or work, violating any state law or rule of the department.

secretary had the discretion as to how much overcrowding gain time to give, ranging from zero to 60 days per inmate. This is a significant difference from basic gain time, where the Legislature prescribed the amount based on the length of the inmate's sentence.

2. The Proceedings Below.

On April 14, 1986, the petitioner pleaded guilty to attempted first degree murder, armed burglary of a dwelling, and possession of a firearm and was sentenced to 22 years in the Florida prison system.[10] J.A. 3, 33, 53. These crimes were committed on October 27, 1985. Lodg. Doc. 144-145.

Upon his arrival at DOC, the department deducted 2,640 days of basic gain time from the petitioner's sentence in accordance with section 944.275(4)(a), Florida Statutes (1985). J.A. 50. During his imprisonment, petitioner received an additional 958 days of incentive gain time under section 944.275(4)(b), Florida Statutes (1985). *Id.*

After the 1987 enactment of the administrative gain time statute, s. 944.276, the department allocated 335 days of administrative gain time to the petitioner. J.A. 50.

Between July 1988 and January 1991, after replacement of administrative gain time by provisional credits, the petitioner received 1,860 provisional overcrowding credits. J.A. 50.

In 1989, the Florida legislature amended the provisional credit statute, s. 944.277, to exclude inmates convicted of murder or attempted murder from eligibility for provisional credits. The limitation on eligibility applied prospectively only to offenders with crimes committed on or after January 1, 1990.

[10] Petitioner also pleaded to possession and delivery of cocaine in two additional cases and was sentenced to three and one-half years in each case. J.A. 49, 50. However, because the petitioner's release date is controlled by the 22-year term, these sentences are not the subject of this proceeding.

Section 6, chapter 89-100, Laws of Florida. In 1992, the Legislature again amended s. 944.277, reenacting the elimination of eligibility for murder-related offenses, but without making that ineligibility prospective.[11]

The lack of language making ineligibility prospective caused confusion. The Florida Department of Corrections initially interpreted the 1992 amendment to require them to continue releasing inmates such as the petitioner based on accumulated provisional credits. Therefore, the department released the petitioner on October 1, 1992. J.A. 50.

However, in December 1992 questions were raised about the department's statutory authority to release, pursuant to provisional credits, inmates like the petitioner who had been convicted of a murder-related offense. In that month, at the request of the secretary of DOC and other state officials, the Florida Attorney General interpreted s. 944.277 and its 1992 amendments and concluded that the offense-based exclusions contained in s. 944.277(1)(h) and (i) applied retroactively effective July 6, 1992, to exclude from eligibility for provisional credits all inmates who committed murder-related offenses before the law's enactment — and to require retroactive cancellation of all provisional overcrowding credits previously allocated. (Later the Florida courts affirmed this interpretation of DOC's statutory authority. *Griffin v. Singletary*, 638 So.2d 500 (Fla. 1994); *Waite v. Singletary*, 632 So.2d 192 (Fla. 3d DCA 1994).) DOC immediately canceled all provisional credits allocated to offenders covered by the 1992 exclusions.

After publication of the Attorney General's opinion, DOC realized that it had unlawfully released some inmates like the petitioner because revoked credits had been counted toward their release dates. Therefore, the department sought a warrant for the petitioner's return to custody. J.A. 51. On May 17, 1993, a state court issued a warrant for the petitioner's arrest,

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[11] Section 944.277(1)(i), Fla. Stat. (Supp. 1992).

and he was returned to custody on June 8, 1993, to complete the remainder of his sentence. J.A. 51.

On August 18, 1994, the petitioner filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. J.A. 2-29. The petitioner alleged that the retroactive cancellation of the provisional credits under the 1992 amendments to s. 944.277(1) violated the ex post facto clause, Article I, Section 10, clause 1, of the United States Constitution. *Id.* The petitioner argued that the revocation of overcrowding, or provisional release, credits previously allocated to him and his return to custody was an unconstitutional increase in the punishment for a crime after its commission. J.A. 22-25.

The respondents opposed the petition, citing a line of state and federal cases standing for the proposition that the overcrowding release statutes were procedural in nature. They argued that overcrowding gain time was procedural because its sole purpose was to provide an orderly mechanism to alleviate the administrative crisis of prison overcrowding not to the traditional purposes of punishment. J.A. 44-46.

On March 14, 1995, a United States magistrate judge recommended that the petition be denied and dismissed with prejudice on the ground that the 1992 amendments to section 944.277(1) were adopted merely as a means to relieve prison overcrowding, and, therefore, were not subject to the prohibitions of the ex post facto clause. J.A. 53-60. The magistrate judge relied on *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), *cert. denied*, — U.S. —, 116 S.Ct 715 (1996). *Id.* On May 10, 1995, the district court adopted the magistrate's report and recommendation, and denied the petition. J.A. 64. Petitioner applied for a certificate of probable cause on June 8, 1995, which the district court denied on June 16, 1995. J.A. 65. The petitioner reapplied for a certificate of probable cause to the United States Court of Appeals for the Eleventh Circuit, which was denied on October 16, 1995. J.A. 66. On January 10, 1996, petitioner filed with this Court a petition for writ of

certiorari. J.A. 67. On May 13, 1996, the Court granted certiorari. J.A. 67.

SUMMARY OF ARGUMENT

This case requires the Court to determine whether elimination of an inmate's ability to use a special type of gain time, which was intended solely to relieve prison overcrowding, in order to secure early release violates the U.S. Constitution's ex post facto clause. In this case, the 1992 Florida Legislature revoked "overcrowding" provisional credits given to the petitioner and others like him who had been convicted of violent crimes.

During the 1980s, in response to rapidly increasing prison populations in a prison system under a consent decree establishing a population cap, the Legislature gave executive branch officials the discretion to reduce the sentences of state prison inmates when prison populations threatened to exceed the cap. Never quite satisfied with the balance struck between public safety and responsible prison management, the Legislature amended overcrowding gain time, formally known as provisional credits, eliminating the ability to use such gain time for classes of inmates such as the petitioner. And finally in 1993, the Legislature revoked all inmates' overcrowding gain time.

The Florida Legislature's actions did not violate the petitioner's constitutional rights or increase his punishment. First, the overcrowding gain time statute under which the petitioner received credits did not exist at the time of his offense, October 1985. Therefore, it cannot be considered part of the range of potential punishment to which he could be subjected, because the ex post facto clause looks at the range on the day of the offense.

Second, overcrowding gain time was a remedial measure whose *sole* objective was to enable prison officials to control

inmate population levels and to maintain compliance with a federal consent decree capping prison populations. It was never intended to be part of the petitioner's sentence or punishment. Because of the strictly remedial nature of the overcrowding gain time statute and the administrative problem it addressed, because receipt of overcrowding credits was contingent upon the occurrence of events outside the petitioners' and the respondents' control, and because the statute provided no expectation or entitlement, the petitioner had "fair warning" that overcrowding gain time did not constitute part of the range of available punishments to which he could be subjected. Thus, the Legislature's revocation of the petitioner's overcrowding credits did not enhance the range of punishment available at the time of the commission of his crime. Instead, it only eliminated an opportunity for early release and did not alter the definition of the punishment to which the petitioner was susceptible.

Since the Florida Legislature did not alter the definition of the petitioner's potential punishment, its revocation of his overcrowding credits did not violate the Constitution's ex post facto clause.

In addition, the Court should defer to the Florida Legislature's judgment about the handling of prison overcrowding. The provisional overcrowding credit statute was reasonably related to a legitimate penological interest in maintaining security and promoting inmates' health and welfare. As such, the decision to revoke the credits is entitled to judicial deference. The Court will show such deference if it regards elimination of the petitioner's provisional overcrowding credits as merely the loss of an opportunity for early release that does not trigger ex post facto protection.

ARGUMENT

I. REVOCATION OF THE PETITIONER'S OVERCROWDING CREDITS DID NOT VIOLATE THE CONSTITUTION'S EX POST FACTO CLAUSE

BECAUSE THEY DID NOT FORM PART OF THE PUNISHMENT TO WHICH HIS CRIME WAS SUSCEPTIBLE.

A. ***Revocation of the petitioner's overcrowding gain time credits did not violate the ex post facto clause because, at the time of his offense, overcrowding gain time did not exist.***

The legislative history makes evident a surprising fact: the statutes by which the petitioner received overcrowding gain time did not exist on the date of his offense.

The petitioner's offense occurred on October 27, 1985. Lodg. Doc. 144-145.

He did not get emergency release credits, since such credits were never given, *Blankenship v. Dugger*, 521 So.2d 1097, 1098 (Fla. 1988), and the Florida Legislature did not enact the second overcrowding gain time statute until 1987, or the third (the loss of which the basis of his claim) until 1988.

Thus, the overcrowding gain time credits the petitioner received came under a statute enacted after the date of his offense.

One essential purpose of the ex post facto clause is to prohibit the state from increasing a convicted person's potential range of punishment as it stood *on the date of the offense*. *Weaver v. Graham*, 450 U.S. at 28, 30-31 ("Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense."); *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 2719 (1990) (citing *Calder v. Bull*, 3 Dall. 386, 390 (1798)).

In this case, overcrowding gain time cannot be a part of the petitioner's potential punishment because the provisionional credit, or overcrowding gain time, statute did not exist in October 1985. Revocation of his overcrowding gain time, instead of increasing his punishment, simply returned him to the same position in which he stood in October 1985. (The petitioner attacks *Hock v. Singletary,* on which the lower courts relied, as wrongly decided. However, *Hock* involved identical ultimate facts: the inmate challenged retroactive application of Florida's control release statute, which took effect *after* he was incarcerated. Although approaching the issue from the slightly different angle, the Eleventh Circuit concluded there was no ex post facto violation because retroactive application did not affect "the quantum of punishment imposed." *Hock*, 41 F.3d at 1472.)

The ex post facto clause does not bar Florida from giving what amounts to after-the-fact clemency to address overcrowding and then revoking it when conditions change. Such actions do not "enhanc[e] the range of available prison terms" or "'impose additional punishment to the term then prescribed'" in October 1985, the date of the petitioner's offense. *California Department of Corrections v. Morales*, 115 S.Ct. at 1602; *Weaver v. Graham*, 450 U.S. at 28. Whatever one might feel about the wisdom of the public policy decisions Florida made dealing with prison overcrowding, they were Florida's to make, uninhibited by the ex post facto clause, given the facts of this case.

For this reason alone, the Court should affirm the decision below.

B. ***Florida's revocation of the petitioner's overcrowding gain time credits did not violate the ex post facto clause. Overcrowding gain time did not form part of the petitioner's potential punishment because the statute provided fair warning that it was not part of the range of punishments to which he was exposed.***

Even if the provisional overcrowding credits statute existed on the date of the petitioner's offense, it still did not form part of the potential punishment for his crime because the statute provided fair warning that it was not included in the penalty.

One of the fundamental purposes of the ex post facto clause is to ensure that citizens have fair warning of the nature of a given crime and its potential punishment. *Weaver v. Graham*, 450 U.S. at 28; *Dobbert v. State of Florida*, 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L.Ed.2d 344 (1977); *Marks v. U.S.*, 430 U.S. 188, 191, 97 S.Ct. 990, 992, 51 L.Ed.2d 260 (1977).

The thrust of *Marks v. U.S.* is that due process fair warning cases provide guidance in the interpretation of the fair warning component of the ex post facto clause. In *Marks*, the Court said that "the principle on which the Clause is based — the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties — is fundamental to our concept of constitutional liberty." *Id.*, 430 at 191. The Court went on to say that the same right to fair warning "is protected against judicial action by the Due Process Clause of the Fifth Amendment." *Id.*, at 192. Thus, the Court held that judicial interpretation of a criminal statute retroactively applying hard core pornography standards to impose criminal liability violated the due process clause in the same way as a retroactive legislative enactment violated the ex post facto clause. See also *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). In a word, fair warning concerns were the same under either clause. Therefore, since fair warning operates the same way under the due process and ex post facto clauses, the cases arising under one clause should apply to those falling under the other.

The "due process fair warning" doctrine arose from cases dealing with criminal statutes challenged as unconstitutionally vague. See, for example, *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); and *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126 (1926). The requirements of fair warning, which are rooted in "a rough

idea of fairness," *Colten v. Commonwealth of Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584 (1972), are straightforward: The statute must be clear enough that a person of common intelligence can determine what is, or is not, proscribed. *Connally v. General Construction Co.*, 269 U.S. at 391[12]; *Grayned v. City of Rockford*, 408 U.S. at 108. Thus, this Court requires that fair notice demands "explicit standards." *Grayned, supra; but see U.S. v. Smith*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974) (requiring reasonably clear guidelines). Where one must guess at a statute's meaning, where different people are reasonably likely to get varying impressions as to the statute's meaning, where one must speculate about its applicability, or where the statute is subject to arbitrary or erratic application, the statute lacks the required fair notice. *Connally v. General Construction Co.*., 269 U.S. at 391, 395; *Bouie v. City of Columbia*, 376 U.S. at 351 ("[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."); *Colautti v. Franklin*, 439 U.S. 379, 390, 99 S.Ct. 675, 683, 58 L.Ed.2d 596 (1979) (fair notice is lacking where a statute "is so indefinite that 'it encourages arbitrary and erratic arrests and convictions.'").

Vulnerability to arbitrary application is an important factor. In *U.S. v. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516 (1921), this Court was presented with the question whether a section of the Lever Act, a wartime measure

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[12] "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

regulating the sale of food, was unconstitutionally vague. The precise language at issue was "made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries . . ." The court concluded that the phrase was unconstitutionally vague because what constituted an unreasonable rate or charge varied with economic conditions. *Id.*, 255 U.S. at 90 n. 2. Because "unreasonable rates" depended on "the vagaries of supply and demand, factors over which [the defendant] had no control,"[13] Mr. Cohen could have no idea what conduct was proscribed.

In the present case, we are not concerned with the definition of criminal behavior. Rather, we are concerned with the question of what fair warning Florida statutes gave of the prescribed punishment for the petitioner's crime. Thus, the fair warning doctrine, applied to the definition of punishments, can be stated: whether a person of common or reasonable intelligence would know that a particular statute was part of the "range of available prison terms" for the petitioner's crime. To reach the answer, one must ask: Is the statute which is the target of the inquiry explicitly included? Must one speculate or guess as to its applicability? Is the statute subject to arbitrary or erratic application?

Although the court has rejected an entitlement or vested rights analysis for ex post facto claims, *Weaver v. Graham*, 450 U.S. at 29 n. 13, one might easily summarize all the questions in the preceding paragraph as: do Florida statutes create a reasonable expectation that the petitioner's sentence will be reduced by overcrowding gain time? Questions about explicit inclusion, speculation or guesswork about applicability, and arbitrary or erratic enforcement can be rolled together in this way because they all have, at their heart, an assumption about reasonable expectations.

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[13] *U.S. v. Powell*, 423 U.S. 87, 92-93, 96 S.Ct. 316, 320, 46 L.Ed.2d 228 (1975).

In this case, the petitioner lacked any reasonable expectation of overcrowding credits. As the Eleventh Circuit noted in *Hock v. Singletary*, 41 F.3d at 1472-1473, overcrowding release "is based on an arbitrary and unpredictable determinant, the prison population level [so] an inmate has no reasonable expectation at the time he is sentenced that the prison population will reach the specified triggering level and that his incarceration will therefore be reduced." The unpredictability, dependency on an essentially arbitrary event, and erratic application of overcrowding gain time distinguish it from basic gain time, whose award is automatic and predictable in amount. *Id.*, 41 F.3d at 1473.

Moreover, eligibility for provisional overcrowding credits depends on the occurrence of other unpredictable events. The Governor had to concur that there was an overcrowding crisis. There is nothing in the statute requiring him to concur. Section 944.277(1), Florida Statutes (Supp. 1992). Furthermore, the amount of provisional overcrowding credits the petitioner could get was subject to the discretion of the DOC secretary, who could award between zero and 60 days.

Thus, because the availability of provisional overcrowding gain time was erratic and subject to unpredictable fluctuations in prison population and to the discretion of the Governor and the secretary, the petitioner had no reasonable expectation that he would get any credits. Lacking this reasonable expectation, he had fair warning that overcrowding gain time was not a part of the range of available punishment for his crime. Since the petitioner had fair warning that provisional overcrowding gain time was not part of the range of available punishment, revocation of that gain time did not offend the ex post facto clause.

C. *Anticipating early release because of overcrowding was too subjective an expectation to justify ex post facto protection.*

The petitioner argues that he reasonably expected to get provisional overcrowding credits at the time he pleaded guilty, so they should be regarded as part of his sentence. Petitioner's brief at 32-35. He bases his reasonable expectation on two points. First, he contends that because the prison system's population was "burgeoning" an award of overcrowding credits was a "near certainty". As a near certainty, he implies that he contemplated, at the time of his guilty plea, that he would receive early release because of prison overcrowding. (He provides no evidence that he actually so contemplated, however.)

The petitioner cannot have anticipated receiving provisional overcrowding credits because the provisional credit statute did not exit in April 1986, when he pleaded guilty.

Assuming that the statute existed at the time of his plea, if the petitioner truly anticipated early release because of overcrowding at the time of his plea, that expectation was speculative. His thinking is like that of a Wall Street trader, who says to himself, "The market is going up, therefore I'm sure to make a profit." In fact, we recognize such thinking as mere speculation, a wish dependent on social and economic factors outside anyone's control. As we know, the market can suddenly go down, as well as up, and upward trends often are interrupted by dives.

Suppose, for example, that after the petitioner's plea, the Florida Legislature had decided to embark on a bigger prison building program during the 1980s (rather than spending money on schools and roads). Or suppose that under the existing building program a prison was opened after his plea, reducing prison populations below the cap. In either situation under the petitioner's theory, his expectation would still be reasonable because no building program existed at sentencing to disrupt his expectation. The petitioner's theory forces the Court to examine prison conditions, legislative appropriations, the prison building program, prison population trends, the rate of prison releases and other factors as they stood *on the day of sentencing* for any

inmate with an overcrowding gain time complaint to determine whether the inmate's expectation was reasonable. The need for such a day-by-day examination of a variety of fluctuating factors exposes the speculative nature of the expectation. Being merely speculative, the petitioner's expectation is subjective.

Like the Eleventh Circuit in *Hock v. Singletary,* the Florida Supreme Court pointed out the inherently speculative nature of provisional overcrowding credits:

> [T]he state's unilateral decision to restrict the "provisional credit" does not trigger the constitutional issues that would be present if some other forms of credits or gain time were at stake. The reason is that provisional credits are not a reasonably quantifiable expectation at the time an inmate is sentenced. Rather, provisional credits are an inherently arbitrary and unpredictable possibility that is [sic] awarded based solely on the happenstance of prison overcrowding. Thus, provisional credits in no sense are tied to any aspect of the original sentence and cannot possibly be a factor of sentencing or in deciding to enter a plea bargain.

Griffin v. Singletary, 638 So.2d at 501

Even the notion that one should examine the petitioner's expectation on the day of sentencing is flawed. Under the ex post facto clause, the critical date is not the date of the sentencing or of the plea, but the date of the offense. *Weaver*, 450 U.S. at 28, 30-31.

Second, the petitioner contends that there was no more speculation involved in the receipt of overcrowding gain time than there was in the receipt of basic gain time. The structure of these very different statutes disproves the point. The award of basic gain time is automatic upon commitment to DOC. Section 944.275, Florida Statutes. Basic gain time comes right off the top of the sentence imposed by the state court, yielding a release date by simple arithmetic: Judge's sentence - basic gain time

(less time lost for disciplinary infractions) = release date. See *Griffin v. Singletary*, 638 So.2d at 501.[14] Not so overcrowding gain time, which required a surge in prison population above a specified threshold of prison bed space, a notification of that event to the Governor by the DOC secretary, a written acknowledgment by the Governor (which he was not required to give if, for some reason, he thought overcrowding releases would be improvident) and, finally, the decision by the secretary as to how much overcrowding gain time to award inmates. See s. 944.277, Florida Statutes (1988 Supp., 1989 and Supp. 1992). In short, overcrowding gain time was contingent upon the happening of several events. Basic gain time is not contingent. *Griffin v. Singletary, supra*.

Nonetheless, *Weaver v. Graham* offers some support for an argument that if "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed," *id.*, 450 U.S. at 32, it should enjoy ex post facto protection. The *Weaver* Court used this possibility as a reason to avoid determining whether basic gain time was actually a part of the punishment at the time of sentencing, implying that such a decision was unnecessary.

The Court should recede from this part of *Weaver*. It is out of step with *Morales'* tight focus on the actual penalty and looks instead to "disadvantage" and "opportunity for early release" considerations *Morales*[15] and *Collins* rejected. It is also inconsistent with the underlying ex post facto principle that the critical date is the date of the offense. In addition, it injects a

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[14] The court said that under Florida law, incentive and basic gain time were markedly different from provisional credits. "These kinds of gain time were reasonably quantifiable at the time of sentencing and thus were a factor that could be taken into account in deciding to enter a plea bargain."

[15] *Morales*, 115 S.Ct. at 1602 n. 3.

subjective and often speculative element into the analysis. The Court should be wary of tying fundamental constitutional limitations on state action to the subjective speculations of criminal defendants at sentencing time.

D. *Revocation of the petitioner's overcrowding gain time amounted only to loss of an opportunity to take advantage of provisions of early release.*

In recent years, ex post facto law had gone astray. In *California Department of Corrections v. Morales* and *Collins v. Youngblood*, this Court made a course correction. The Court said that the sole focus of an ex post facto inquiry is not whether someone has suffered a disadvantage or lost an "'*opportunity* to take advantage of provisions for early release,'", but "whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Morales*, 115 S.Ct. at 1602 n. 3 (emphasis the Court's).

Provisional overcrowding gain time was not part of the penalty by which the petitioner's crime was punishable. Thus, revocation of his overcrowding gain time represented only the loss of an opportunity to take advantage of provisions of early release, a deprivation which should not offend the Constitution.

Citing *Weaver*, the petitioner urges the Court to consider revocation of the opportunity to secure early overcrowding release as an *increase* in his sentence. There is a logical discontinuity here, which the *Morales* Court apparently sensed. It is hard to see how the loss of an opportunity to decrease a sentence imposed by the court (as automatically modified by basic gain time) actually results in an increase.

As *Morales* implies, it is fair, sensible, good public policy and consistent with the ex post facto clause to treat overcrowding gain time for what it is, a form of clemency, granted at the state's discretion, that constitutes only an opportunity for early release and is not part of the petitioner's actual sentence. Since it is not part of the actual sentence,

removing the opportunity does not *increase* the sentence. In reality, the sentence remains unchanged.

II. THE 1992 REVOCATION OF THE PETITIONER'S OVERCROWDING GAIN TIME CREDITS DID NOT OFFEND THE POLICIES UNDERLYING THE EX POST FACTO CLAUSE.

As the petitioner points out, this Court has identified three policy considerations underlying the ex post facto clause:

1. To restrain the national and state legislatures from enacting arbitrary or vindictive legislation. *Miller v. Florida*, 482 U.S. 423, 429, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987);
2. To provide fair warning of the elements of a crime and the nature of its punishment. *Id.*, 482 U.S. at 430; and
3. To "uphold[] the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing law." *Weaver v. Graham*, 450 U.S. at 29 n. 10.

None of these policies were offended by the 1992 revocation of the petitioner's overcrowding gain time.

First, the 1992 amendment eliminating overcrowding gain time for the petitioner was neither arbitrary nor vindictive. It did not single him out personally, like a bill of attainder. It did not increase his punishment from that in effect on the day he committed his crime. Indeed, the Florida Legislature did not intend its overcrowding enactments to be a form of punishment. It acted solely to address a pressing issue of prison management to give prison officials the statutory tools they needed to keep prison populations under a federally mandated cap. In doing so, the Legislature had to balance issues of inmate rights under a federal consent decree and the Eighth Amendment against public safety. As often happens, the balance was not struck immediately. The scale wobbled in one direction and the other until it steadied. The Florida Legislature's action must be seen

in that light, not as a vindictive, arbitrary act. Eliminating the eligibility of violent offenders to gain early release due to prison crowding was a reasonable act. See *Keeton v. State of Oklahoma*, 32 F.3d 452, 453 (10th Cir. 1994).

We have already dealt above with the second ex post facto policy.

On the third point, separation of powers, the petitioner argues that revocation of overcrowding gain time injects the Legislature into the sentencing process in violation of separation of powers principles. While maintaining separation of powers between courts and legislatures is, in our system, a fundamental constitutional goal, it is not the province of the federal courts to police the forays of state legislatures into the domains of state courts. There is no *federal* constitutional prohibition against state legislative invasions of the powers of their local courts. Rather, these are questions of *state* law, which should be remedied in the state courts under state constitutional limitations. A federal court should only concern itself with the effect of legislative action, which is the objective of *Morales'* tight focus on whether an enactment retroactively increased the punishment for a crime after the date of its occurrence.

In any event, Florida's revocation of overcrowding gain time did not offend separation of powers principles. In Florida, state executive branch officials can act only pursuant to constitutional or statutory authority. *State ex. rel. Smith v. Jorandby*, 498 So.2d 948 (Fla. 1986). State prison officials have no power to release inmates to control prison populations without statutory authority. In order to control prison populations, the Florida Legislature made a policy judgment that such authority was necessary. Later, it made a similar policy judgment that part of that grant of authority was improvident and withdrew it. Neither act involved interference in the petitioner's actual sentence or trampled on executive or judicial branch prerogatives.

III. THE COURT'S PRISON DEFERENCE CASES AND FEDERALISM AND COMITY CONCERNS

REQUIRE THE COURT TO AFFIRM THE DECISION BELOW.

In other cases involving inmates' fundamental rights, this Court has applied a standard designed to take into account the deference and restraint federal courts should exercise when reviewing challenges to the constitutionality of regulations governing prison management. *Thornburgh v. Abbott*, 490 U.S. 401, 407-408, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987).

Since provisional overcrowding credits are intended solely for prison management, there is no reason why this Court should not employ a deference-tempered standard here. The failure to do so is inconsistent with the deference this Court traditionally accords states' efforts to cope with the difficult job of prison management. See *Lewis v. Casey*, — U.S. —, 116 S.Ct. 2174 (1996); *Turner v. Safely*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Jones v. North Carolina Prisoners Labor Union*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). In matters dealing with prison management, this Court has said in these cases that federal courts should defer to the judgment of prison officials if the challenged policy or practice is reasonably related to a legitimate penological interest. *Turner*, 482 U.S. at 89, 107 S.Ct. at 2261 ("when a prison regulation impinges in inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if 'prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations."); *Procunier v. Martinez*, 416 U.S. 396, 404-405, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974) (deference to prison administrators' decisions was appropriate because judicial involvement in the details of prison management was beyond the

competence of the courts and these state officials were in a better position to make the delicate judgments that prison management requires.). The central issue in *Turner* was whether the Court should adopt a strict scrutiny or a rational basis test for reviewing challenges to prison regulations addressing legitimate penological interest. Opting for a standard that incorporated appropriate deference, the Court rejected strict scrutiny because applying that test to "day-to-day judgments" of prison officials "would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* (In the Court's deference cases, strict scrutiny was a rigid, narrow, difficult test. It is not unlike the rigid, narrow ex post facto test the petitioner proposes — the loss of an opportunity to subtract a day off time served amounts to an increase in his sentence and, therefore, an ex post facto violation.)

The Court's deference cases also involved challenges to executive branch policies. However, there is no reason why the Court should not defer to a prison policy enacted by a state legislature. It is, after all, the job of legislatures to establish prisons, to set the policies by which they are run, and to delegate authority to the executive branch to carry those policies out. Legislatures are a step removed from direct operation, but since they are still directly involved in the setting of prison policies and prison operation, they must consider the same minutia as the executive branch and are better positioned than courts to make the delicate judgments that prison management requires. In fact, in *Turner*, this Court recognized that legislative acts concerning prison management may be entitled to deference. *Id.*, 482 U.S. at 84-85 ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the *Legislative* and Executive Branches of Government. Prison administration is, moreover, a task that has been committed to the responsibility of *those* branches, and separation of powers concerns counsel a policy of

judicial restraint." Emphasis added.)[16]. Therefore, legislative decisions that are rationally related to a legitimate penological interest should be given the same degree of deference.

Provisional, or overcrowding, credits are rationally related to legitimate penological interests. One such interest is internal security, the central issue of prison management. *Pell v. Procunier*, 417 U.S. at 823, 94 S.Ct. at 2804. When the district court in *Costello* issued its preliminary injunction ordering reductions in Florida's prison population because of overcrowding, it concluded based on the facts presented that there was a relationship between overcrowding and the risk of inmate assaults. *Costello v. Wainwright*, 397 F.Supp at 38. Certainly prevention of violence is an internal security matter. The district court also concluded that, based on the facts presented, overcrowding in Florida's prisons affected inmate health and general welfare. *Id.* Therefore, controlling prison population and preventing overcrowding is a legitimate penological interest. See also *Keeton v. State of Oklahoma*, 32 F.3d 451, 452 (10th Cir. 1994) ("We agree with the district court that the state has a legitimate interest in reducing prison overcrowding and thereby diminishing the many attendant difficulties related to overcrowding."); *Shifrin v. Fields*, 39 F.3d 1112, 1114 (10th Cir. 1994) (Oklahoma's analogue to provisional overcrowding credits was rationally related to a legitimate penological interest).

Providing early release mechanisms, such as provisional overcrowding credits, is rationally related to these interests. They allow a direct way of reducing the inmate population.

It is also reasonable and serves legitimate penological interests to release one class of inmates based on the nature of their crime and not another. See *Keeton v. State of Oklahoma*,

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[16] *Turner*, however, did not involve a legislative policy. Turner challenged Missouri Division of Corrections rules governing inmate correspondence and marriage.

32 F.2d at 452 ("the state has a legitimate interest in designating that only prisoners who have been convicted of lesser crimes or who are subject to no higher than medium security may be released so as to avoid a greater threat to society." Therefore, Oklahoma's analogue to provisional overcrowding credits was constitutional.); *Shifrin v. Fields*, 39 F.3d at 1114.[17]

Therefore, the Court should not invalidate Florida's revocation of the petitioner's provisional overcrowding credits. Rather, it should view revocation as merely the elimination of an opportunity to enjoy early release from prison which does not trigger the ex post facto clause. Such a test is consistent with the Court's objective in *Turner* to fashion "a standard of review of prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" *Id.*, 482 U.S. at 85.[18]

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[17] "The district court correctly determined that Appellant failed to make a viable argument that excluding inmates from emergency time credits because of their status as violent or repeat offenders violates the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment."

[18] Given the evolution of deference doctrine as reflected in *Turner*, the Court may wish to reexamine the reasoning and the result in *Weaver v. Graham*. A case can be made that the deference doctrine, which wasn't considered in *Weaver*, requires the federal courts to uphold retroactive changes in basic gain time against an ex post facto challenge. Whether basic gain time, the kind at issue in *Weaver*, is part of the punishment or represents an opportunity for early release, like provisional overcrowding gain time, is a close question. Basic gain time can easily be regarded more as an opportunity for early release and a behavior management tool than as a part of the sentence. Furthermore, basic gain time reasonably serves the legitimate penological interest of security maintenance because, as a behavior management tool, it preserves prison security.

If the Court fails to afford this degree of deference, it will stifle the sort of innovative management experimentation it sought to protect in *Turner*.

Comity and federalism concerns also militate against interference in Florida's efforts to control its prison population.[19] Management of state prisons is a fundamental exercise of state sovereignty. The ability to control population size is an important management tool. If the Court decides that overcrowding gain time falls under the ex post facto clause, it will significantly and unreasonably limit Florida's ability to manage its prisons, without having furthered the underlying purposes of the ex post facto clause.

CONCLUSION

For these reasons, Respondent Butterworth asks the Court to affirm the decision below.

RESPECTFULLY SUBMITTED,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JASON VAIL
Assistant Attorney General
Fla. Bar no. 298824
Counsel of Record

Office of the Attorney General
Building 2, room 204
1317 Winewood Blvd.
Tallahassee, FL 32399
(904)488-2381
(904)922-3947 (fax)

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[19] "Where a state penal system is involved, federal courts have . . . additional reason to accord deference to appropriate prison authorities." *Turner*, 482 U.S. at 85.

QUESTION PRESENTED

Whether the retroactive application of Florida Statute § 944.277 (Supp. 1992), by withdrawing credits previously allocated petitioner for release solely to alleviate prison overcrowding, increases the punishment for petitioner's 1985 offense of conviction in violation of the Ex Post Facto Clause of the United States Constitution.

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CONSTITUTIONS, STATUTES, AND RULES

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

No. 95-7452

KENNETH LYNCE,
Petitioner,

v.

HAMILTON MATHIS, ROBERT BUTTERWORTH
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENT MATHIS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The *Ex Post Facto* Clause of the United States Constitution, Article I, Section 10, clause 1, provides in pertinent part: "No State shall . . . pass any . . . ex post facto Law . . . ."

2. The provisions of § 944.277, Fla. Stat. (Supp. 1992) have been set out in Petitioner's Appendix A. All other statutory provisions of Florida Statutes relevant to this case have been lodged by the petitioner under separate cover.

STATEMENT OF THE CASE

1. Overview

The petitioner is a prisoner in the custody of the Florida Department of Corrections (FDOC). Respondent Mathis is the Florida official who held petitioner in custody at the time he filed his petition for writ of habeas corpus with the federal district court in Florida. Respondent Butterworth is the Attorney General of Florida.

This case involves a challenge to Florida's cancellation of 1,860 days of "provisional credits" allocated to petitioner because of prison overcrowding. These credits are one of a series of four overcrowding control mechanisms used by Florida to maintain its prison population under a cap mandated by a federal consent decree. When necessary to reduce the prison population, these credits, in limited amounts, were allocated to a pool of statutorily eligible inmates when a triggering threshold was reached.

In October 1992, because of overcrowding, petitioner was released prior to reaching his actual release date.[1] The FDOC released the petitioner, and others with like offenses, based upon its initial interpretation of the 1992 amendments to the provisional credits statute, s. 944.277, that the petitioner remained eligible for overcrowding release. However, in December 1992, the Florida Attorney General determined that the 1992 Florida Legislature in fact had intended to remove petitioner and

[1] The October 1992 release was based upon a provisional release date forecast for prison overcrowding needs through the periodic allocation of provisional credits.

similar offenders from eligibility for overcrowding release by retroactively cancelling previously allocated credits.[2] The Florida Attorney General's interpretation was later upheld by the Supreme Court of Florida.[3] Because the petitioner was determined statutorily ineligible for release, he was returned to state custody to serve the remainder of his sentence.

Petitioner challenged the cancellation of credits and his return to custody through federal habeas corpus proceedings, alleging a violation of the *Ex Post Facto* Clause. The United States District Court for the Middle District of Florida denied the petition and the Circuit Court of Appeals for the Eleventh Circuit declined review. In May 1996, this Court granted the petitioner's petition for writ of certiorari to determine whether the 1992 legislative cancellation of the petitioner's overcrowding credits violated the *Ex Post Facto* Clause of the U. S. Constitution.

2. Florida's Overcrowding Statutes - An Exercise In Prison Crisis Management.

Since the early 1970s, the Florida prison system has battled a burgeoning prison population. In 1972, a class action brought in the federal district court in Jacksonville, Florida, sought to close Florida's prison system to additional admissions and to reduce the existing population

[2] 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992).

[3] *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994).

to acceptable constitutional levels.[4] The prison population reached such crisis levels by 1974 that the FDOC's secretary three times temporarily closed the system to new admissions.[5] In 1975, as a result of continued overcrowding, the federal district court enjoined the FDOC to lower its prison population to acceptable levels.[6] Eventually, in 1980, the FDOC entered into a consent agreement which capped the prison population and established a lawful capacity which the Florida prison population could not exceed without federal court intervention.[7]

Florida sought ways to confront the seemingly unstemmable flood of prisoners. In June 1982, when the prison population threatened to extend beyond its federally mandated cap, the Governor called a special session of the legislature. Lodg. Doc. 76. During this session, the Florida Legislature appropriated funds to construct, staff and operate beds to resolve the immediate overcrowding dilemma and created a Corrections Overcrowding Task Force (COTF) to assess long-term solutions. *Id.*

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[4] *See Costello v. Wainwright*, 397 F.Supp. 20 (M.D. Fla. 1975), *aff'd* 525 F.2d 1239 (5th Cir. 1976). This case, originally filed as a challenge to prison medical care, was expanded to include overcrowding concerns after the district court appointed counsel for the class.

[5] *Costello*, 397 F.Supp. at 22.

[6] *Id.*

[7] "Lawful capacity" was defined as "the total design capacity of all institutions and facilities in the state correctional system, increased by one-third." *See* § 944.023, Fla. Stat. (Supp. 1992). The consent decree limitations were enacted by the Florida Legislature as part of the termination of the agreed injunction. *Id.*, n.1.

The COTF recommended comprehensive reform legislation.[8] Lodg. Doc. 74.[9] Among other things, the COTF made three significant public policy recommendations. First, it prescribed replacing the existing indeterminate sentencing system with a system of sentencing guidelines. Lodg. Doc. 73, 112-113. This proposal, it was thought, would not only make sentencing more uniform and meaningful, but would also allow predictability in prison population growth. *Id.* Second, the COTF recommended revamping the archaic gain-time system provided under s. 944.275 to focus less on length of service and more on good behavior and productive activities.[10] Lodg. Doc. 72-74. It was thought that the

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[8] This legislation became known as The Correctional Reform Act of 1983. 1983 Fla. Laws ch. 83-131. Included in the legislation were provisions for development of a community control program, sentencing reform (i.e., sentencing guidelines), gain-time revision, improved parole and probation efficiency, youthful offender improvement, a new siting process, and an emergency release mechanism. Lodg. Doc. 74.

[9] The petitioner has filed with the Court a compilation of public records which have been designated as "Lodged Documents". For consistency, the respondent has utilized the same citation form as designated by the petitioner.

[10] Florida utilizes three types of gain-time as prison management tools "to encourage satisfactory prisoner behavior, to provide incentive for prisoners to participate in productive activities, and to reward prisoners who perform outstanding services." § 944.275(1), Fla. Stat. (1983 - 1995). The first type, basic gain-time, is a lump-sum, automatic award, based upon length of sentence, which is deducted from an inmate's sentence immediately upon incarceration. § 944.275(4)(a), Fla. Stat. Basic gain-time is non-discretionary and may only be forfeited for specified misconduct. § 944.275(5), § 944.28, Fla. Stat. The second type, incentive gain-time, is discretionary and may be awarded on a monthly basis, as earned, for work and other productive activities, such as participation in educational or vocational programs. § 944.275(4)(b),

mandatory gain-time awarded to inmates based upon length of sentence tended to reward more serious offenders with longer sentences and that the complexity and focus of the monthly discretionary gain-time tended to undermine its effectiveness as a prison management tool. Lodg. Doc. 72. Simplifying the gain-time system was also expected to enhance prison population predictability. Lodg. Doc. 73. Finally, the COTF suggested creation of a stop-gap, early release mechanism that would serve as a "safety valve" in the event that the recommended reforms could not bring the prison population under control.[11] Lodg. Doc. 75, 114.

Over time, the Florida Legislature experimented with four "safety valve" overcrowding mechanisms. Each mechanism was crafted to facilitate expedient releases and to minimize risk to public safety.[12] As overcrowding

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Fla. Stat. The last type of gain-time, meritorious gain-time, is also discretionary, but is only awarded for extraordinary services, such as saving a life or preventing an escape. § 944.275(4)(c), Fla. Stat.

[11] The COTF recognized the overcrowding question as a diverse problem influenced by state population growth, national economic conditions and urban tendencies, which required development of a "long-range plan prospectus." Lodg. Doc. 74. The COTF was well aware of the hazards of relying solely upon the recommended reforms, noting in its report that "the concept of a Sentencing Commission is an untried regulatory mechanism, and while we assume the process will work well, it may not function as intended. * * * Therefore, some mechanism must be set in place to make release judgements should inmate overcrowding outstrip available prison capacity." Lodg. Doc. 114.

[12] Petitioner suggests in his statement of the case that the overcrowding credits, like gain-time under s. 944.275, were earned or awarded for good behavior or productive activities during periods of overcrowding. Brief of Petitioner at 3, n.5. This is not s.. Overcrowding credits were never awarded to promote good behavior. *See Eidson v. State*, 667 So. 2d 248 (Fla. 1st Dist Ct. App. 1995) (credit for

concerns subsided, the Florida Legislature systematically narrowed the pool of offenders eligible for early release. The progression of these statutes was:

- **Emergency Gain-Time - Section 944.598:** Enacted in 1983. Administered by FDOC. Triggered if the prison population reached 98% of lawful capacity up to 1987, and at 99% of lawful capacity up to 1993. Contained no offense-based exclusions. Authorized emergency release based upon incremental reductions of emergency gain-time during first 15 days; additional releases after 15 days limited to inmate population with less than one year remaining to serve. In effect between 1983 and 1993, but never implemented.[13]

- **Administrative Gain-Time - Section 944.276:** Enacted in February 1987. Administered by FDOC. Triggered if the prison population reached 98% of lawful capacity. Contained a limited number of offense-based exclusions for violent and habitual offenders. Authorized overcrowding

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time served does not include provisional credits or administrative gain-time which is used to alleviate prison overcrowding and is not related to satisfactory behavior while in prison). Petitioner's suggestion perhaps rests upon the requirement that inmates statutorily eligible for overcrowding release must also be "earning incentive gain-time" before credits could be allocated. This requirement, or its equivalent, appeared in the three overcrowding statutes administered by the FDOC. *See* § 944.276(1), Fla. Stat.; § 944.277(1), Fla. Stat.; § 944.598(1), Fla. Stat.; Lodg. Doc. 17, 19, 26. Because the FDOC did not make individualized reviews to determine the risk to public safety, this requirement served as a risk-reducing factor and nothing more. While the provision may have inspired good behavior, it was incidental to its actual purpose.

[13] *See* § 944.598, Fla. Stat. (1983), Lodg. Doc. 26; 1983 Fla. Laws ch. 83-131; 1993 Fla. Laws ch. 93-406; *see also Blankenship v. Dugger*, 521 So. 2d 1097, 1098 (Fla. 1988).

releases through limited incremental allocations of administrative gain-time. First mechanism to implement overcrowding releases. Repealed effective July 1, 1988. Administrative gain-time allocations were subsequently cancelled for all offenders in custody on June 17, 1993.[14]

• **Provisional Credits - Section 944.277:** Effective July 1, 1988, upon repeal of the administrative gain-time statute. Triggered if the prison population reached 98% of lawful capacity. Contained a more extensive list of offense-based exclusions for violent and habitual offenders. Authorized releases through limited incremental allocations of provisional credits. Included a provision for 90 days of post-release supervision to enhance public safety. Amended in 1989 to exclude murder-related offenses and a variety of offenses against law enforcement and judicial officers. The 1989 exclusions were prospective, for offenses committed on or after January 1, 1990. Amended in 1992 to remove the prospectivity provision from the 1989 act and to cancel provisional credits previously allocated to offenders with murder-related or law enforcement offenses. Statute became inoperational in January 1991 when Florida Parole Commission assumed responsibility for overcrowding releases under s. 947.146. Repealed effective June 17, 1993. Provisional credits previously allocated were cancelled for all offenders in custody on that date.[15]

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[14] *See* § 944.276, Fla. Stat. (1987), Lodg. Doc. 17; § 944.278, Fla. Stat. (1993); 1993 Fla. Laws ch. 93-406.

[15] *See* § 944.277, Fla. Stat. (Supp. 1988), Lodg. Doc. 19; § 944.277(1)(h),(i), Fla. Stat. (1989), Lodg. Doc. 21; 1989 Fla. Laws ch. 89-100; § 944.277(1)(h),(i), Fla. Stat. (Supp. 1992), Lodg. Doc. 23; 1992 Fla. Laws ch. 92-310; 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992), Lodg. Doc. 53-60; § 944.278, Fla. Stat. (1993), Lodg. Doc. 16; 1993 Fla. Laws ch. 93-406.

• **Control Release - Section 947.146:** Enacted in 1989, with an effective date of September 1, 1990. Administered by the Florida Parole Commission. Contains offense-based exclusions similar to provisional credits statute. Authorizes release on fixed date or on advancing date, pursuant to rules. Remains in place as current overcrowding control mechanism.[16]

Florida's prison population stabilized below lawful capacity in December 1994 and no releases for overcrowding have been made since that time.

3. The Proceedings Below.

On April 14, 1986, petitioner Kenneth Lynce pleaded *nolo contendere* to attempted first degree murder, armed burglary of a dwelling, and possession of a firearm and was sentenced to 22 years in the Florida prison system.[17] J.A. 3, 33, 53. These crimes were committed on October 27, 1985. Lodg. Doc. 144-145.

Upon receipt into state custody, the department applied 2,640 days of basic gain-time to petitioner's sentence in accordance with section 944.275(4)(a), Florida Statutes

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[16] *See* § 947.146, Fla. Stat. (1989).

[17] Petitioner also pleaded to possession and delivery of cocaine in two additional cases and was sentenced to three and one-half years in each case. J.A. 49, 50. However, because the petitioner's release date is controlled by the 22-year term, these sentences are not the subject of this proceeding.

(1985), and established petitioner's initial tentative release date. J.A. 50. During the course of his incarceration, petitioner earned an additional 958 days of incentive gain-time under section 944.275(4)(b), Florida Statutes (1985), for good behavior and productive activities, which further reduced his tentative release date. *Id.*

Following the February 1987 enactment of the administrative gain-time statute, s. 944.276, petitioner was placed in a pool of eligibles for overcrowding release, and was allocated 335 days of administrative gain-time because of overcrowded conditions.[18] J.A. 50. In July 1988, the administrative gain-time statute was replaced by another overcrowding-control mechanism, provisional credits, s. 944.277. Petitioner initially remained eligible for overcrowding release under the provisional credits statute. Because overcrowding conditions persisted, the FDOC allocated 1860 days of provisional credits to petitioner between the inception of the statute in July 1988 and January 1991, when the responsibility for overcrowding releases was assumed by the Florida Parole Commission. J.A. 50.

In 1989, the Florida Legislature amended the provisional credits statute, s. 944.277, to exclude inmates convicted of murder or attempted murder offenses.[19] The amendment was applied prospectively to offenders with crimes

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[18] Petitioner's administrative gain-time was cancelled on June 17, 1993, pursuant to § 944.278; however, petitioner does not challenge its cancellation in this case.

[19] § 944.277(1)(i), Fla. Stat. (1989).

committed on or after January 1, 1990.[20] However, during the 1992 legislative session, section 944.277 was again amended and the murder offense exclusion was reenacted, effective July 6, 1992.[21] The 1992 amendment also eliminated the prospectivity provision for the murder offense exclusion included in the 1989 version of the statute.[22]

The FDOC, no longer responsible for overcrowding releases, gave limited effect to the 1992 Act and failed to cancel credits for the excluded categories contained in s. 944.277(1)(h) and (i) to remove these offenders from overcrowding release eligibility. On October 1, 1992, petitioner was discharged from custody prior to reaching his tentative release date,[23] in spite of his ineligibility for provisional overcrowding release. J.A. 50.

The FDOC's failure to properly implement the retroactivity provisions of the 1992 Act was not detected until after petitioner's release. In December 1992, when questions arose about the FDOC's authority to grant overcrowding releases to inmates convicted of murder related offenses, the FDOC sought the opinion of the

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[20] *See* 1989 Fla. Laws ch. 89-100.

[21] § 944.277(1)(i), Fla. Stat. (Supp. 1992); 1992 Fla. Laws ch. 92-310.

[22] Id.

[23] A tentative release date is the projected date of release calculated by subtracting all jail credit awarded by the sentencing court as well as all basic gain-time awarded upon incarceration and all incentive gain-time earned thereafter. § 944.275(2)(a), (3)(a), Fla. Stat.

Florida Attorney General. After a review of all of the 1992 provisions of s. 944.277, the Florida Attorney General concluded that the offense-based exclusions contained in s. 944.277(1)(h) and (i) applied retroactively and further required that provisional credits previously allocated for offenders excluded under these two provisions be cancelled in order to give full effect to the statute's ineligibility provisions.[24]

The FDOC immediately cancelled all provisional credits allocated to offenders covered by the 1992 exclusions. Because petitioner had been determined ineligible for early release, the department sought a warrant for his return to custody through the court that originally sentenced petitioner.[25] J.A. 51. On May 17, 1993, the sentencing court issued an Order for Execution of Sentence Imposed and Retaking of Prisoner. *Id.* Petitioner was arrested pursuant to this order and returned to custody on June 8, 1993, to complete the remainder of his sentence.[26] J.A. 51.

On August 18, 1994, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. J.A. 2-29. Petitioner alleged that the retroactive cancellation of the provisional credits under the 1992 amendments to section 944.277(1) violated the prohibition against *ex post facto* laws under Article I, Section 10, clause 1 of the United States Constitution. *Id.* Petitioner argued that the revocation of the provisional release credits previously allocated to him and his return to custody was an unconstitutional increase in the punishment for a crime after its commission. J.A. 22-25.

The FDOC opposed the petition, citing a series of state and federal cases which supported the department's position that the overcrowding statutes were procedural in nature, whose sole purpose was to alleviate the administrative crisis of prison overcrowding. J.A. 44-46. On March 14, 1995, a United States Magistrate Judge recommended that the petition be denied and dismissed with prejudice on the ground that the 1992 amendments to section 944.277(1) were adopted merely as a means to relieve prison overcrowding, and, therefore, were not subject to the prohibitions of the *Ex Post Facto* Clause. J.A. 53-60. The

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[24] 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992).

[25] Because petitioner was in custody on July 6, 1992, when the amendment became effective and required his removal from early release eligibility, petitioner's credits should have been cancelled on that date. The department determined that the cancellation of the 1860 days of provisional credits would reinstate his tentative release date of November 4, 1997. J.A. 50. Petitioner erroneously states that the retroactive cancellation of the provisional credits resulted in a new release date of May 19, 1998. The 1998 release date reflected in the affidavit cited by petitioner at page 52 of the Joint Appendix was the release date calculated at the time the affidavit was prepared on November 29, 1994 in anticipation of filing a response to the petition before the district court. J.A. 34.

[26] By law, the FDOC was entitled to return petitioner to custody. *See Carson v. State*, 489 So. 2d 1236 (Fla. 2d Dist. Ct. App. 1986) (when an inmate is released or discharged from prison by mistake, he may be recommitted if his sentence would not have expired had he remained in confinement). Because petitioner's release was through error of the FDOC, he was afforded credit for all time while out of custody. J.A. 52; *Sutton v. Strickland*, 531 So. 2d 1009 (Fla. 1st Dist. Ct. App. 1988) (when an inmate is released by mistake, his sentence continues to run in the absence of some fault on his part).

magistrate judge specifically relied on *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct 715 (1996). *Id.* The United States District Court for the Middle District of Florida adopted the magistrate's Report and Recommendation on May 10, 1995, and denied the petition. J.A. 64. Petitioner applied for a Certificate of Probable Cause on June 8, 1995, which was denied by the district court on June 16, 1995. J.A. 65. The petitioner reapplied for a Certificate of Probable Cause to the United States Court of Appeals for the Eleventh Circuit, which was also denied on October 16, 1995. J.A. 66. On January 10, 1996, petitioner filed with this Court a petition for writ of certiorari. J.A. 67. On May 13, 1996, the Court granted certiorari. J.A. 67.

SUMMARY OF ARGUMENT

This case involves a Florida inmate (the petitioner) who was initially considered eligible for an early release if necessary to keep Florida's prison population under a federally mandated cap on capacity. Under a prison overcrowding statute not in existence at the time he committed his crime, the FDOC, using the incremental allocation of credits, forecast a provisional date to release the petitioner if overcrowding thresholds so required. Before petitioner reached his actual release date and before the earlier date forecast for release because of prison overcrowding, the Florida Legislature enacted amendments (the 1992 Act) to remove petitioner, and others like him, from eligibility for release because of prison overcrowding, based upon the violent nature of his crime.

Through a misinterpretation of the 1992 Act, the FDOC failed to remove petitioner from eligibility and erroneously and, without statutory authority, released petitioner on the

date forecast for prison overcrowding release. When the misinterpretation of the statute came to light and was corrected, petitioner was reimprisoned to serve the balance of his remaining lawful sentence.

Florida's overcrowding statutes were enacted solely as administrative procedures to control prison overcrowding. The purpose of the overcrowding statutes was two-fold: 1) controlling prison population levels in times of prison overcrowding and 2) minimizing the risk to public safety. The non-punitive purpose of the statutes and the public safety interest at stake required their liberal construction, and their retroactive application. While generally statutes are presumed to apply only prospectively, Florida's overcrowding statutes implicitly operated retroactively in order to effectuate clear legislative purpose.

As stop-gap mechanisms to control prison overcrowding, these statutes were not contemplated to work as a component of the sentencing system or to be incorporated as part of the traditional in-prison gain-time system by which an inmate could reduce his sentence for good behavior. Under Florida law, a prisoner's actual sentence is determined by the interaction of the original sentence imposed under the sentencing guidelines reduced by statutorily authorized gain-time awarded for good behavior. Overcrowding early release credits were not included as part of the statutorily authorized gain-time deductions which are the typical determinants of actual length of incarceration after imposition of sentence because the need for these credits was generated on factors outside of the sentencing scheme which contribute to overcrowding and which are irrelevant to determining appropriate punishment.

At the time that petitioner committed his crime in 1985, the provisional release statute under which he eventually

was allocated early release credits had not been enacted. No overcrowding releases had been made under the predecessor statute in effect when petitioner committed his crimes. While overcrowding persisted during this time, it was addressed primarily by increasing prison capacity. Because of the highly speculative and unpredictable nature of overcrowding, petitioner could not have reasonably expected that overcrowding needs would actually shorten his term of incarceration or provide a "formula" for calculating a new sentencing range on the day he was sentenced.

Allocation of credits under the overcrowding statutes was merely part of a procedure to forecast a possible release date if necessary to continue to meet overcrowding needs. Petitioner accrued no absolute right to the forecasted credits and their withdrawal amounted to no more than removal of a "hope" of possible release.

The *Ex Post Facto* Clause protects against retroactive legislative changes that "inflict a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). Not every disadvantage or lost opportunity to take advantage of the provisions for early release will violate this constitutional prohibition. *Cal. Dept. of Corrections v. Morales*, 115 S. Ct. 1597, 1062 n.3 (1995). Only those legislative changes which produce more than a "speculative, attenuated" risk of an increase in punishment will violate the Constitution. *Id.* When petitioner committed his crime, the possibility of a reduced term of confinement because of prison overcrowding was so remote that it amounted to no more than a "glimmer of hope". Since release or a reduced term of confinement because of overcrowding could not reasonably be considered a part of petitioner's punishment when he committed his crimes, the deprivation of the

opportunity for overcrowding release cannot have in any real way increased petitioner's punishment.

Petitioner's release from custody occurred as a result of the FDOC's misinterpretation the 1992 Act which removed petitioner's eligibility for overcrowding release. The *Ex Post Facto* Clause does not establish a right to the continued misapplication of law. Petitioner was not reimprisoned to serve an additional five years but only to serve the remainder of his lawful sentence as originally imposed.

ARGUMENT

I. THE 1992 AMENDMENTS TO FLORIDA STATUTES SECTION 944.277 WHICH RETROACTIVELY REMOVED CERTAIN CLASSES OF VIOLENT OFFENDERS FROM ELIGIBILITY FOR RELEASE TO ALLEVIATE PRISON OVERCROWDING DID NOT INCREASE PETITIONER'S PUNISHMENT AND, THEREFORE, DID NOT VIOLATE THE EX POST FACTO CLAUSE.

Article I, §10, of the Constitution prohibits states from enacting *ex post facto* laws. Under the *Ex Post Facto* Clause, a state may not apply retroactively any law that "inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). The question of whether a particular legislative change produces consequences sufficient to invoke the prohibitions of the *Ex Post Facto* Clause is a matter of "degree". *Beazell v. Ohio*, 269 U.S. 167 (1925). However, not every legislative change that "disadvantages" an offender or affects a prisoner's "opportunity to take

advantage of the provisions for early release" violates the Constitution. *Cal. Dept. of Corrections v. Morales*, 115 S. Ct. 1597, 1602 n.3 (1995). Rather, a law must produce "a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, 115 S. Ct. at 1603. While no exact formula for determining when a particular legislative change produces a sufficient effect on punishment to fall within the prohibitions of the *Ex Post Facto* Clause, the Court has made clear that the risk of affecting a prisoner's actual term of confinement must be more than "speculative and attenuated". *Id.*

A. Provisional Credits And Other Forms of Overcrowding Gain-Time Are Neither An Integral Part of the Punishment Attached to Petitioner's Crimes Nor A Critical Determinant of the Length of Petitioner's Incarceration Because Their Are Part of Administrative Procedures Designed To Alleviate Prison Overcrowding, A Phenomenon Created By Factors Unrelated to a Prisoner's Punishment.

Any ex post facto inquiry necessarily must begin by examining the parameters of the punishment prescribed by law at the time the crime was committed. This Court has established that a law which provides the opportunity for reductions in sentence may fall within the scope of the *Ex Post Facto* Clause if it is one determinant of a prison term, which, if changed, enhances the effective sentence. *Weaver v. Graham*, 450 U.S. 24, 32 (1981). Petitioner maintains that provisional release credits, like other forms of gain-time which serve to reduce a sentence, is a critical determinant of the length of his incarceration and, therefore, are "part and parcel" of his punishment.

However, petitioner's analysis of the role of overcrowding credits in the sentencing process suffers from the same fatal flaws as those presented by the petitioners in *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994), *Dugger v. Rodrick*, 584 So. 2d 2 (Fla. 1991), *cert. denied sub nom. Rodrick v. Singletary*, 502 U.S. 1037 (1992), and *Blankenship v. Dugger*, 521 So. 2d 1097 (Fla. 1988).

In *Blankenship*, *Rodrick*, and *Griffin*, Florida's highest court considered various ex post facto and due process challenges to changes in Florida's overcrowding control statutes.[27] In each case, the Florida Supreme Court compared the traditional forms of gain-time[28] awarded for good behavior with the various overcrowding credits used by the state to control prison overcrowding. The court drew significant distinctions between the statutes' purposes, nature, operation, and relationship to the sentence imposed. The supreme court noted that gain-time for good behavior, particularly basic gain-time, interacted with the sentence in a quantifiable way and, therefore, became an actual

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[27] In *Blankenship*, the petitioner, who met the eligibility requirements for overcrowding release under the emergency gain-time statute, § 944.598, challenged the removal of that eligibility upon the 1987 enactment of the administrative gain-time statute, § 944.276. *Blankenship*, 521 So. 2d at 1097. In *Rodrick*, the petitioner challenged the withdrawal of his eligibility for overcrowding release upon enactment of the provisional credits statute, § 944.277. Rodrick had been eligible for early release under two predecessor overcrowding statutes (emergency gain-time and administrative gain-time). *Rodrick*, 584 So. 2d at 3. In *Griffin*, the petitioner challenged the retroactive cancellation of provisional credits under the 1992 amendments to § 944.277 and the later cancellation of administrative gain-time under § 944.278, effective June 17, 1993. *Griffin*, 638 So. 2d at 500.

[28] These forms of gain-time are those granted under § 944.275, Fla. Stat.: basic, incentive and meritorious.

determinant of the expected term of incarceration.[29] These forms of gain-time were used to encourage good in-prison behavior, foster rehabilitation, and encourage work and other productive activities. In stark contrast, the court found that the enabling statutes for overcrowding credits articulated administrative procedures which served the singular purpose of controlling prison overcrowding. *Rodrick*, 584 So. 2d at 3-4; *Blankenship*, 521 So. 2d at 1089. Their issuance was highly speculative and entirely predicated on many outside economic and sociological variables which typically contribute to prison overcrowding. The statutes could not be used by prison officials to promote good behavior or work activities. Of particular importance, the court found that overcrowding credits bore no relationship to the original penalty assigned the crime or the actual penalty calculated under the sentencing guidelines.[30] *Griffin*, 638 So. 2d at 500; *Rodrick*, 584 So. 2d at 2; *Blankenship*, 521 So. 2d at 1097.

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[29] Basic gain-time is applied as a lump-sum award based upon length of sentence immediately upon incarceration. *See* § 944.275(4)(a), Fla. Stat.; *Rodrick*, 584 So. 2d at 4. Its mandatory application at the commencement of a sentence assures an offender a shorter definitive term of incarceration than imposed by the judge at the time of sentencing. For this reason, it has been considered a significant "factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Rodrick*, 584 So. 2d at 4, citing *Weaver v. Graham*, 450 U. S. at 32, 1010 S. Ct. at 966. Incentive gain-time, while less predictable because of its discretionary and contingent nature, could be hypothetically estimated based upon length of sentence imposed. *Rodrick*, 584 So. 2d at 4.

[30] Overcrowding concerns and credits traditionally have been treated as falling outside of the sentencing process in Florida. The conjectural nature of overcrowding and overcrowding releases prevents these factors from being a reasonable basis for a plea. *Griffin*, 638 So. 2d at 501

Because of the peculiar and highly speculative nature of overcrowding credits and their dedicated purpose, the Florida Supreme Court concluded that the statutes were not subject to ex post facto restrictions because they did not make "more burdensome the punishment for a crime, after its commission." *Rodrick*, 584 So. 2d at 4, citing *Beazell v. Ohio*, 269 U.S. 167, 169, 46 S. Ct. 68, 70 L. Ed. 216 (1925). The Florida Supreme Court's analysis was later adopted by the federal courts. *See Hock v. Singletary*, 41 F. 3d 1470 (11th Cir. 1995); *Herring v. Singletary*, 879 F.Supp. 1130 (N.D. Fla. 1985); *see also* J.A. 44-45, n.5, for a list of unpublished cases.

Like the petitioners in *Griffin* and *Rodrick*, petitioner attempts to equate overcrowding credits, or early release credits, with gain-time awarded for good behavior, which has been considered a determinant part of the penalty attached to petitioner's crime. Brief of Petitioner at 19, n.23. Petitioner cites several sources in an effort to

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(provisional credits are inherently arbitrary and unpredictable, based solely on the happenstance of prison overcrowding, and cannot possibly be a factor at sentencing or in deciding to enter a plea). Such considerations are not a permissible basis for upward or downward departures from permitted ranges under the sentencing guidelines. *See State v. Moore*, 630 So. 2d 1235 (Fla. 2 Dist. Ct. App. 1994). And overcrowding credits, unlike gain-time provided under § 944.275, may not be credited as as time served against a new sentence imposed upon revocation of probation or community control. *See Tripp v. State*, 622 So. 2d 941 (Fla. 1993); *Eidson v. State*, 667 So. 2d 248 (Fla. 1 Dist. Ct. App. 1995) (credit for time served does not include provisional credits or administrative gain-time which is used to alleviate prison overcrowding and is not related to satisfactory behavior while in prison); *Gant v. State*, 642 So. 2d 84 (Fla. 2 Dist. Ct. App. 1994); *Webb v. State*, 630 So. 2d 674 (Fla. 4 Dist. Ct. App. 1994).

demonstrate that overcrowding credits, like the traditional forms of gain-time, were considered an integral component of Florida's sentencing guidelines system. However, most of these sources refer to gain-time in a general fashion and do not define what types may be included in the term. Others are taken out of context.

For example, to support his position that all types of gain-time, including overcrowding gain-time credits, were intended to function as a substitute for parole, petitioner points to the Senate Staff Analysis and Economic Impact Statement for SB 644 which discusses fifteen major policy changes in the legislation drafted by the Corrections Overcrowding Task Force (COTF). *See* Brief of Petitioner at 20, n.23. Petitioner focuses on a statement in paragraph 4, which provides "[p]ersons convicted on or after the effective date of the act shall no longer be eligible for parole and shall have their release governed by expiration, *gain-time*, or clemency." (emphasis added) Lodg. Doc. 39. The emergency overcrowding release mechanism, which eventually became known as emergency gain-time, is discussed separately in paragraph 3. The discussion of Florida's law on gain-time is discussed in paragraph 7. From this singular reference to "gain-time" in paragraph 4, petitioner concludes that overcrowding release credits were incorporated into the sentencing guidelines scheme. To the contrary and more significantly, the COTF Report which actually gave rise to the legislation being analyzed clearly distinguishes between the role of the emergency overcrowding release mechanism, as an interim, stop-gap measure, until the new sentencing system could take effect, and the role of "gain-time" as the legislatively authorized means by which sentences may be reduced. (Compare discussion at page v, 70 of the Report [Lodg. Doc. 75, 114] with discussion at pages iii, iv [Lodg. Doc. 72-73]). The discussion in the COTF Report clearly reveals that the

emergency release mechanism was not intended to operate in conjunction with the sentencing scheme, but only if the new sentencing guidelines system did not eliminate the overcrowding problem as planned. *See*, *supra* at 6, n.11.

Similarly, petitioner cites to the Senate Staff Analysis and Economic Impact Statement for SB 3A from February 4, 1987, which discusses the impact of implementing Florida's second generation overcrowding control mechanism, administrative gain-time. The summary first describes the three traditional forms of gain-time -- basic, incentive, meritorious -- which traditionally have served as the exclusive methods by which a term of imprisonment could be reduced by an inmate for good behavior. The emergency overcrowding release statute is mentioned separately, in a different context. Lodg. Doc. 46. As with the emergency gain-time provisions, the staff analyst describes the administrative gain-time overcrowding mechanism as a temporary, stop-gap measure to address intake surges experienced by the FDOC as the result of 1986 directives of the Florida Supreme Court which accelerated the disposition of criminal cases. Lodg. Doc. 47. Nothing in the report supports the conclusion that the terms "early release credits" and "gain-time" may be used interchangeably or that the term "gain-time can be read in all contexts as including overcrowding credits.

Petitioner further points to a passage in the sentencing guidelines promulgated by the Florida Supreme Court in 1985 under the Rules of Criminal Procedure:

> [t]he sentence imposed by the sentencing judge should reflect the length of time to be served, shortened only by the application of gain-time.

Fla. R. Crim. P. 3.701(b)(5) (1985) (reported in *The*

Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988--*Sentencing Guidelines*), 468 So. 2d 220, 222 (Fla. 1985) Lodg. Doc. 32. Again, from another singular reference to "gain-time", petitioner concludes that "[s]tate law plainly provides that early release gain-time was an integral part of the punishment imposed for petitioner's offense." Petition of Respondent at 21. Yet there is no definition of what types of "gain-time" may be encompassed by this reference or the significance of the passage itself.[31]

In spite of clear indications to the contrary, Petitioner continues to insist that Florida has including overcrowding credits as part of the traditional gain-time system as a functional part of its contemporary sentencing system. The COTF Report makes abundantly clear that the overcrowding mechanisms were neither a replacement for parole under the previous indeterminate sentencing scheme nor a part of the traditional gain-time system in place for over 100 years. The Florida Supreme Court has repeatedly recognized that early release credits dedicated to controlling prison overcrowding play no role in Florida's sentencing scheme. *Blankenship*, *Rodrick*, *Griffin*, *supra*. Legislative

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[31] An equally plausible explanation for this reference can be found in Florida Statutes. There is only one enactment entitled "Gain-time" and that is found in § 944.275. Section 944.275 is the legislative authorization for basic, incentive and meritorious gain-time -- the three types of gain-time which the COTF clearly addressed in its report as being the traditional reductions of sentence for good behavior. In contrast, all of the overcrowding "early release credits" were enacted in separate and distinct statutory provisions. Only two of the overcrowding statutes included any reference to "gain-time" (emergency gain-time and administrative gain-time). Petitioner does not explain how "provisional credits" are encompassed in this statutory reference to "gain-time".

history dictates the same result.[32]

Petitioner's contention that Florida intended to include overcrowding credits as an integral part of its contemporary sentencing system is illogical. To include overcrowding credits within the context of the determinant sentences contemplated by the sentencing guidelines undermines uniformity of sentencing, one of Florida's fundamental purposes in enacting the guidelines system. Clearly Florida did not intend to put in place a system of punishment for crimes that provide less punishment to those who offend during times of prison overcrowding than for those whose crimes occur during times of sufficient prison capacity. Petitioner seeks constitutional protection for an illogical and inequitable notion of punishment.

Petitioner's analysis of the role of overcrowding credits in Florida's sentencing process fails to take into account significant state judicial precedent and legislative history which distinguish overcrowding credits from the traditional types of gain-time and clearly define the role of the overcrowding statutes in the sentencing process. Petitioner obscures these important distinctions in an effort to demonstrate a nexus between overcrowding credits and the original sentence imposed. In order to invoke the protections of the *Ex Post Facto* Clause, petitioner must demonstrate that overcrowding credits are a substantial

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[32] Overcrowding credits evolved exclusively as "stop-gap" release mechanisms that would serve as a "safety valve" in the event that the sentencing reforms enacted under the Correctional Reform Act of 1983 could not bring the prison population under control. Lodg. Doc. 75, 114. The "gain-time" reductions to sentences imposed under the guidelines were specifically addressed by the COTF in drafting the reform legislation and are clearly limited to the three types of gain-time referenced in § 944.275, Fla. Stat. Lodg. Doc. 72-74.

consideration in the sentencing process and, therefore, part of the penalty assigned to his crimes. In the absence of such a nexus, petitioner's ex post facto claim must fail.

The *Ex Post Facto* Clause "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." *Weaver*, 450 U.S. at 31. The constitutional prohibition protects against enhanced punishment but does not assure a right to less punishment. *Id.* Overcrowding credits were not enacted as part of the sentencing scheme which gave rise to petitioner's punishment. Their creation was to address the highly conjectural and speculative phenomenon of prison overcrowding. The petitioner seeks to invoke a constitutional protection for less punishment. The potential to receive a very early release from incarceration based on the unpredictable phenonmenon of prison overcrowding is precisely the "speculative and attenuated" risk this Court has found insufficient to invoke the constitutional prohibitions of the *Ex Post Facto* Clause. *Morales*, 115 S. Ct. at 1603.

B. At the Time Petitioner Committed His Crimes, Petitioner Could Not Have Reasonably Expected That He Would Benefit From A Non-Existent Statute.

At the time petitioner committed his crimes in October 1985, the parameters of his punishment were governed by § 775.082, Fla. Stat. (1985), and the sentencing guidelines under Fla. R. Cr. P. 3.701 and 3.988, reduced only by gain-time as provided for in § 944.275, Fla. Stat. (1985). Petitioner entered a plea of *nolo contendere* and six months later received a sentence of 22 years in prison for the primary offense of attempted murder. Upon transfer to the

FDOC, petitioner immediately received his mandatory basic gain-time award of 2640 days, roughly reducing his sentence from 22 years to 15 years. § 944.275(4)(a), Fla. Stat. (1985); J.A. 50. Petitioner also became immediately eligible to accrue monthly incentive gain-time; however, because this type of gain-time is purely discretionary, contingent on the wishes of correctional authorities and availability of work and program assignments, and, of course, the special behavior of the inmate, the actual reduction in sentence is not immediately quantifiable.[33] § 944.275(4)(b), Fla. Stat. (1985). Thus, petitioner's punishment on the date he committed his crimes and on the date he was sentenced was in real terms, 15 years, with the possibility that he could achieve an earlier release through monthly gain-time awards.

In April 1986, at the time of petitioner entered his *nolo* plea, the only overcrowding control mechanism in effect was the emergency gain-time statute. § 944.598, Fla. Stat. (1985). Although enacted in 1983, prison population levels never reached the threshold capacity to trigger its operation. *See Blankenship v. Dugger*, 521 So. 2d 1097, 1098 (Fla. 1988). Thus, petitioner had no tangible evidence that he would receive benefit of this statute when he committed his crimes or at the time he pleaded *nolo contendere* to his offense.

Moreover, even if a state of emergency was declared under § 944.598, the maximum benefit petitioner immediately could have realized was an award of 30 days

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[33] Of course, a hypothetical, "best of all possible worlds" estimate of the reduced sentence can be made based upon maximum awards available by law; however, there is nothing to assure that any inmate will actually achieve this hypothetical release date.

of emergency gain-time. § 944.598(2), Fla. Stat. (1985); Lodg. Doc. 27. If the state of emergency persisted after 15 days, releases were limited to those offenders who were within a year or less of their actual release dates. § 944.598(3)-(4), Fla. Stat. (1985), Lodg. Doc. 27. Because of petitioner's lengthy term, the likelihood that the emergency gain-time statute would have any impact upon petitioner's release from incarceration was most assuredly remote.

Although the advent of the provisional credits statute was over two years away, petitioner nonetheless maintains that he had a reasonable expectation of receiving these specific overcrowding credits.[34] It is doubtful that petitioner could have foreseen the future. When petitioner committed his crimes in October 1985, Florida had been grappling with

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[34] Overcrowding was not a new phenomenon in Florida. The FDOC had been coping with overcrowding since the early 1970s. *See Costello v. Wainwright*, *supra*. During the years immediately preceding petitioner's crime, Florida had appropriated funds to construct new prison beds to address the dilemma. *See* Corrections Overcrowding Task Force, *Final Report and Recommendations* (1983), Lodg. Doc. 76. Petitioner notes that less than a month before his sentencing, the number of inmates in Florida's state prison system exceeded 98 percent of capacity, the statutory trigger for authorization of provisional release credits, and that prison overcrowding was not soon to go away. Brief of Petitioner at 28, n.34. The fact that Florida's prison capacity reached 98 percent bore no significance at that time. Provisional credits were an unknown commodity, not due for creation for two more years. The triggering mechanism for the emergency release statute remained at 99 percent of capacity. Thus, the 99 percent threshold, and not the 98 percent threshold is the only overcrowding release factor of significance at the time petitioner was sentenced. Petitioner places great reliance on continued overcrowding concerns; however, there was nothing to assure him that Florida would resort to the emergency release mechanism rather than to construct additional prison beds to stave off the latest wave of new admissions, as had been done in the past.

prison overcrowding for over a decade. Yet, not one emergency release had occurred. The likelihood that petitioner would receive benefit of emergency release was remote; and the prospect that he would receive the windfall benefit of a not-yet-existent statute was more remote.

Against this backdrop, Petitioner's contention that continued overcrowding made the award of these credits a certainty stretches credulity. The emergency gain-time statute had never been implemented and no prisoners had been released. Unless petitioner was able to predict the future, petitioner had no legitimate expectation at the time of his crime or his plea that he would receive any sentence reduction as a result of prison overcrowding under the existing statute, let alone a reduction of sentence by credits from a not-yet-existent statute. At most, petitioner possessed a mere hope of release because of prison overcrowding -- not a reality. *See Hock v. Singletary*, 41 F. 3d 1470 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 715 (1996).[35] The future allocation of credits under the statute

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[35] Petitioner points out that the Eleventh Circuit reached opposite conclusions in its decisions in *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 715 (1996) and *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989). Petitioner finds these opposite opinions irreconcilable: "If the prospect of possible acquisition of early release credits is not too speculative to undergird reasonable expectations of early release, neither is the award of provisional credits due to prison overcrowding." However, this Court has held that whether a particular legislative change produces consequences sufficient to invoke the prohibitions of the *Ex Post Facto* Clause is a matter of "degree". *Morales*, 115 S. Ct. at 1603, citing *Beazell v. Ohio*, 269 U.S. at 171. And, not every legislative change that "disadvantages" an offender or affects a prisoner's "opportunity to take advantage of the provisions for early release" violates the Constitution. *Morales*, 115 S. Ct. at 1602 n.3 (1995). It was apparently obvious to the Eleventh Circuit the degree to which changes to the two prison management statutes affect a prisoner's

enacted in 1987 and their subsequent cancellation under the 1992 were too attenuated to invoke the protections of the *Ex Post Facto* Clause. *Morales*, 115 S. Ct. at 1603 (the amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* Clause).

II. UNDER THE *LINDSEY-WEAVER-MILLER* RULE, FLORIDA'S OVERCROWDING STATUTES DO NOT AFFECT A PRISONER'S PUNISHMENT WITHIN THE MEANING OF THE *EX POST FACTO* CLAUSE.

In *Collins v. Youngblood*, 497 U.S. 37 (1990), the Court heralded the return of the *Ex Post Facto* Clause to its original intent and meaning. Continuing its refinement in *Morales*, the Court emphasized that it is the "increase in the penalty by which a crime is punishable" which triggers the *ex post facto* prohibitions not just any potential disadvantage occasioned by a prisoner or change that may alter the expected term of confinement. *Morales*, 115 S.Ct. at 1602, n.3; *Collins*, 497 U.S. at 43 (1990). The Court noted that several of its prior opinions suggested that enhancements to the measure of criminal punishment fell within the ex post facto prohibitions because they operated to the "disadvantage" of covered offenders. *Morales*, 115 S. Ct. at 1602, n.3. However, the Court acknowledged

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punishment is significantly different.

that the proper focus of the *ex post facto* inquiry was not whether a legislative change produces some ambiguous sort of "disadvantage" or whether the change affects a prisoner's opportunity to take advantage of provisions for early release but whether the change alters the definition of criminal conduct or increases the penalty by which a crime is punishable. *Id.* The Court pointed out that the "disadvantage" language utilized in the *Lindsey-Weaver-Miller* trilogy was unnecessary to the results in those cases, because, in each case, the original criminal penalty had been enhanced.[36]

The most closely analogous case in the *Lindsey-Weaver-Miller* trilogy is *Weaver*. The Court's refinement of

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[36] In *Lindsey v. Washington*, 301 U.S. 397 (1937), the petitioners had been convicted of grand larceny, and the prescribed penalty for grand larceny was imprisonment for an indeterminate sentence not to exceed fifteen years. After commission of the crimes, but before sentencing, Washington amended the law to require offenders convicted of these crimes to be sentenced to the maximum 15 years in prison, with an earlier release obtainable only through parole. The amendment eliminated any sentence less than 15 years and, thus, the standard of punishment for the Lindseys at sentencing was increased from a range of years to the maximum of 15 years.

In *Miller v. Florida*, 482 U.S. 423 (1987), the Court reviewed a challenge to a change in Florida's sentencing guidelines that increased a presumptive sentencing range for sexual offenders from 3½ to 4½ years to 5½ to 7 years through an alteration in the formula for establishing the presumptive sentencing range by increasing the "offense points" assigned to those crimes. Because the penalty was increased to require imposition of a sentence between 5½ to 7 years, a range which exceeded the original maximum statutory penalty of 4½ years in place on the date Miller committed his crime, the Court found the statutory change violated the *Ex Post Facto* Clause.

The decision in *Weaver* is discussed, *infra*.

Weaver provides the litmus test for determining when a state statute which provides for a prison management mechanism runs afoul of the *Ex Post Facto* Clause. In *Weaver*, the Court considered the effect of changes in Florida's gain-time statutes which retroactively reduced the amount of an automatic, mandatory reduction in length of sentence for prisoners committing crimes before the effective date of the new law. The original statutory provision reviewed required the FDOC to apply a lump-sum award of gain-time based upon length of term imposed when a prisoner was first received into custody. This gain-time was retained by the prisoner so long as he complied with prison rules and state law. Thus, on the date of sentencing (and, more importantly, on the date the crime was committed), an offender's actual prison penalty -that is, his punishment - was calculated as the actual sentence less the award of mandatory gain-time.[37] Because the reduction in the amount of mandatory gain-time raised the level of the lower end of the range of prison terms and made these lower ranges no longer attainable, the Court concluded the "quantum of punishment" had been increased in violation of the *Ex Post Facto* Clause.

Morales teaches that the *Ex Post Facto* Clause is not implicated simply because a state statute retroactively "disadvantages" an offender but rather the law must "produce a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, 115 S.Ct. at 1603. Under *Morales*, the statute must affect the

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[37] In petitioner's case, his 22-year sentence became roughly a 15-year sentence by application of automatic (basic) gain-time. Unlike the petitioner in *Weaver*, petitioner can make no tangible prediction of his penalty based upon overcrowding credits as they are contingent on many factors outside the sentencing process and prison operations.

original punishment and it must produce a sufficient risk of increasing the original punishment.

Petitioner's entire focus is on the potential length of incarceration. "Incarceration is punishment, and longer incarceration a greater punishment" is not the test. At the time petitioner committed his crime, he could have no more than a "glimmer of hope" that overcrowding concerns might afford him the opportunity for very early release from his actual punishment. Unlike the petitioner in *Weaver*, petitioner cannot show that the punishment for his crimes on the date he committed them was something less than the 22 years to which he was actually sentenced, or that 22 years would be affected in the least by overcrowding. Petitioner may not, in retrospect, conclude, that provisional credits allocated at a time well after his crime and imposition of sentence to forecast a provisional release date in anticipation of overcrowding needs increased his original punishment when Florida withdrew his provisionally calculated release in the absence of a need to release him to satisfy overcrowding concerns. The 1860 days of provisional credits allocated to petitioner were no more than components of a projected release - a forecast - made by the FDOC in anticipation of the need to control prison overcrowding. When Florida petitioner's release was no longer warranted in order to satisfy overcrowding concerns, all petitioner suffered was a "lost opportunity". The effect of overcrowding was not tangible, predictable, or calculable on the day petitioner committed his crime. Since overcrowding credits could play no role in his sentence on the day he committed his crime, it could play no role in later increasing his punishment.

Petitioner's "expectation" of unconditional, mandatory release through provisional credits, in the absence of continued overcrowding and the state's need for additional

releases, was not legitimate or shared by the state. Although petitioner Lynce may be disappointed he failed to receive the windfall of early release due to prison overcrowding, he has not been harmed by the state's requirement that he serve his sentence as originally imposed. The very nature of prison overcrowding gave petitioner fair warning that his "glimmer of hope" might not materialize into an earlier release. The protections of the *Ex Post Facto* Clause have not been invoked in this case.

III. THE EX POST FACTO CLAUSE DOES NOT PROTECT A RIGHT TO THE CONTINUED MISAPPLICATION OF LAW. THEREFORE, BECAUSE PETITIONER WAS UNLAWFULLY AND ERRONEOUSLY DISCHARGED FROM CUSTODY AFTER HE WAS DEEMED INELIGIBLE FOR EARLY RELEASE UNDER THE 1992 ACT, THE FDOC WAS ENTITLED TO RETURN THE PETITIONER TO PRISON TO COMPLETE THE REMAINDER OF THE SENTENCE IMPOSED

A. The Exclusionary Provisions of Florida's Overcrowding Statutes, As Part of An Administrative Mechanism To Control Prison Overcrowding, Were Properly Construed As Retroactive Statutes.

Florida's overcrowding statutes are administrative procedures enacted to regulate prison population levels when new admissions exceed lawful capacity. *See Griffin, Rodrick, Blankenship, supra.* In implementing these statutes, the Florida Legislature crafted the statutes to serve a two-fold purpose: 1) controlling prison population levels

in times of prison overcrowding and 2) minimizing the risk to public safety. The non-punitive purpose of the statutes and the public safety interest at stake required their liberal construction, and their retroactive application.

To give full effect to the non-punitive legislative purpose, the FDOC applied the overcrowding statutes, including the provisional credits statute, to the prison population without regard to date of offense. The legislative purpose was clear on the dates of enactment of the various statutes that the exclusions applied in the interest of public safety at the onset of overcrowding and not to some future prison population developed after overcrowding concerns abated. This was not only a reasonable interpretation of how the statutes were to operate but an inescapable one. The retroactive nature of the overcrowding statutes was validated on numerous occasions by Florida's highest court. *See Griffin, Rodrick, Blankenship, supra.*

While generally statutes are presumed to apply only prospectively, *see Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1496 (1994), in certain instances, statutes, by their very nature and purpose, may implicitly carry retroactive effect in order to effectuate clear legislative purpose. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 223 (1988) (a particular statute may in some circumstances *implicitly* authorize retroactive application). Florida's overcrowding statutes necessarily require implicit retroactive application in order to give full and appropriate force and effect to their legislative purposes.

In light of the retroactive nature of the overcrowding statutes, the Florida Legislature was acutely aware of the need to include explicit language in the statutes only if it intended to achieve prospective application. For this reason, in 1989, when the exclusion for murder-related

offenses was first enacted, the legislature determined the provision should apply only to new offenders and included a specific prospective effective date.[38] Thus, the subsequent reenactment in 1992 of these same provisions, omitting the prospective effective date for sections 944.277(1)(h) and (i), evidenced clear legislative intent that these two exclusions should now apply to all offenders in those categories, including those who were previously eligible.

The 1992 Act followed on the heels of the transfer of responsibility for overcrowding control from the FDOC to the Florida Parole Commission.[39] Offenders like petitioner were ineligible for overcrowding release under the control release statute administered by the commission. *See* § 947.146(4)(i), Fla. Stat. (Supp. 1990). Further legislative action was necessary to completely remove these offenders from overcrowding release eligibility. The 1992 Act embodied that legislative action.

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[38] *See* 1989 Fla. Laws ch. 89-100; § 944.277, Fla. Stat. (1989), n.2.

[39] In 1989, the Florida Legislature enacted legislation to transfer the responsibility for overcrowding control from the FDOC to the Florida Parole Commission. *See* Ch. 89-526, Laws of Fla., codified as section 947.146, Florida Statutes (1989). Effective September 1, 1990, this transfer of authority allowed an individualized assessment of the risk of release for the inmates deemed statutorily eligible for overcrowding release. Like its predecessor statutes, the control release statute contained an extensive list of offense exclusions. Inmates convicted of murder-related offenses were statutorily ineligible for control release. § 947.146(4)(i), Fla. Stat. (Supp. 1990). No provisional credits were allocated after the Florida Parole Commission commenced control releases in January 1991. *See* 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992).

The interpretation accorded the 1992 Act by the Florida Attorney General was not only foreseeable, it was the only interpretation which could give effect to the legislative purpose in reenacting the provisions.

B. The Corrected Interpretation of the 1992 Act By the Florida Attorney General and the Subsequent Judicial Validation of That Interpretation Did Not Unconstitutionally Extend The Retroactive Reach of the Statute.

The *amicus* Florida Public Defender Association suggests that the reinterpretation of the 1992 Act by the Florida Attorney General and the later ratification of that interpretation by the Supreme Court of Florida in *Griffin*, *supra*, constitutes an retroactive expansion of Florida law which "flies in the face of this Court's ex post facto clause/due process clause jurisprudence." Brief of *Amicus Curiae* at 16. The *amicus* relies on a line of cases which merge the principles of *ex post facto* jurisprudence with principles of due process to prevent the retroactive application of unforeseeable judicial enlargements of criminal statutes.[40] *See Bouie v. Columbia*, 378 U.S. 347 (1964); *Douglas v. Buder*, 412 U.S. 430 (1973); *Marks v. United States*, 430 U.S. 188 (1977). These cases, at most, are of tangential relevance.

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[40] The *Ex Post Facto* Clause is a limitation upon the powers of legislative bodies and does not of its own force apply to the judicial branch of government. *See Marks v. United States*, 430 U.S. 188, 191, 97 S. Ct. 990, 992, 51 L.Ed.2d 260 (1977). Because fundamental principles of "fair warning" which protect against arbitrary governmental action undergird both the *Ex Post Facto* and Due Process Clauses, the Due Process Clause of the Fourteenth Amendment bars the retroactive application of a judicial construction which enlarges a criminal statute.

In *Bouie*, the primary case cited by the *amicus*, this Court struck down a novel construction of a state criminal trespass statute which the Supreme Court of South Carolina had adopted in affirming the convictions of two black college students who had entered, and declined to leave, a segregated restaurant. The Court held that it violated due process to convict someone based upon a retroactive criminal prohibition only recently defined through judicial construction. *Bouie*, at 354, 84 S. Ct. at 1703. The major premise of *Bouie* and the other cases cited by the *amicus* is that a person should know before he acts what conduct is criminal so that he may make an informed decision as to whether to conform his conduct to the law. For this reason, under the Due Process Clause and not the Ex Post Facto clause, judicial constructions that expand the definitional scope of criminal statutes may not be applied retroactively. *See Marks*, 430 U.S. at 191. But no such issue is presented in this case. The challenged enactment does not define a crime which has been the subject of judicial construction. Rather, the statute removes an eligibility to retain credits allocated as part of an administrative procedure to allow the orderly release of prisons if, and only if, prison population levels exceed capacity thresholds. Thus, petitioner was not presented with the concern of conforming his conduct in some way to the terms of the law even, as his conduct had not bearing on the operation of the law.

The ex post facto question in this case as it relates to petitioner's original crimes is the same whether the ineligibility for credit is applied prospectively or the credits are cancelled retroactively. The change occasioned by the 1992 Act either affects the original punishment or it does not. *See Herring v. Singletary*, 879 F. Supp. 1180, 1184 (N.D. Fla. 1995).

C. The *Ex Post Facto* Clause of the Constitution Does Not Confer A Right to the Continued Misapplication of Law.

The *Ex Post Facto* Clause does not prohibit the correction of a misapplied law. *See Stephens v. Thomas*, 19 F.3d 498, 500 (10th Cir. 1994); *see also*, *Cortinas v. United States Parole Commission*, 938 F.2d 43, 46 (5th Cir. 1991); *Glenn v. Johnson*, 761 F.2d 192, 194-195 (4th Cir. 1985)(holding no *ex post facto* violation where agency conformed to Attorney General opinion correcting misapplication of statute limiting parole until minimum had been served); *Caballery v. United States Parole Commission*, 673 F.2d 43, 47 (2d Cir.), *cert. denied*, 457 U.S. 1136 (1982).

The 1992 Act rendered petitioner ineligible for overcrowding release. The FDOC failed to give full effect to the Act when it continued to allow petitioner's eligibility. When the FDOC released petitioner on the forecast provisional release date, it did so without statutory authority. Petitioner's release was unlawful and Florida was entitled to reincarcerate petitioner to serve the remainder of the sentence as originally imposed.[41]

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[41] *See Carson v. State*, 489 So. 2d 1236 (2 Dist. Ct. App. Fla. 1986)(when an inmate is released or discharged from prison by mistake, he may be recommitted if his sentence would not have expired had he remained in confinement); *Johnson v. State*, 561 So. 2d 1254 (2 Dist. Ct. App. 1990)(fact an inmate was mistakenly released from custody before serving a prison sentence did not terminate that sentence). Because petitioner's release was occasioned by the FDOC's erroneous interpretation of the 1992 Act, he was entitled to receive credit for all time spent at liberty. *See Sutton v. Department of Corrections*, 531 So. 2d 1009 (1 D.C.A. Fla. 1988); *Green v. Christiansen*, 732 F.2d 1397 (9th Cir. 1984); *see also Giles v. State*, 462 So.2d 1063 (Ala.Cr.App. 1985); *State v.*

While it is unfortunate that the department's failure to immediately give effect to the 1992 Act necessitated petitioner's return to custody, the FDOC's mistake in releasing him does not implicate the *Ex Post Facto* Clause. *See Stephens*, *Cortinas*, *Glenn*, *Caballery*, *supra*. Given the fact that the FDOC's limited interpretation of the 1992 Act essentially gave it no effect at all, the Florida Attorney General's interpretation that cancellation of credits was required to remove petitioner's eligibility was not only foreseeable, it was inescapable. The *Ex Post Facto* Clause does not afford petitioner the right to enforce a misinterpreted law. *See id.*

While petitioner could have raised other constitutional or state law claims involving his reincarceration after his erroneous release, petitioner is foreclosed from raising such claims now.[42] If the Court ultimately concurs that the retroactive provisions of the 1992 Act fall outside the scope of the *Ex Post Facto* Clause, then petitioner's return to custody and his continued incarceration must stand.

Coleman, 149 Fla 28, 5 So.2d 60 (1941); *White v. Pearlman*, 42 F.2d 788 (10th Cir. 1930).

[42] During the course of the proceedings below, Respondent pointed out that petitioner's return to custody could give rise to additional claims not encompassed by the *ex post facto* challenge, and, therefore, the petition would be subject to dismissal under the exhaustion doctrine. J.A. 36. Petitioner elected to proceed solely on his *ex post facto* claim.

CONCLUSION

For the reasons set forth above, the judgment of the Eleventh Circuit Court of Appeals denying the Certificate of Probable Cause to review the denial of the Petition for Writ of Habeas Corpus should be affirmed.

Respectfully submitted,

Susan A. Maher
Deputy General Counsel
Florida Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399
(904) 488-2326

Counsel of Record on behalf of Respondent Mathis

August 30, 1996

No. 95-7452

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KENNETH LYNCE,
Petitioner,
v.
HAMILTON MATHIS, ROBERT A. BUTTERWORTH, and HARRY K. SINGLETARY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

Of Counsel:
CARTER G. PHILLIPS
PAUL A. HEMMERSBAUGH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

H. JAY STEVENS
JOEL T. REMLAND *
Federal Public Defender
Middle District of Florida
80 N. Hughey Avenue
Suite 417
Orlando, FL 32801
(407) 648-6338
Counsel for Petitioner

* Counsel of Record

September 30, 1996

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REPLY BRIEF OF PETITIONER

Respondents' primary argument in support of their retroactive withdrawal of Petitioner's early release credits is that the initial award of release credits was contingent and uncertain. That argument fails entirely to address the ex post facto issue presented in this case. It is undisputed that Respondents in fact *did* lawfully award early release credits to Petitioner. Given that fact, retrospective assessment of Petitioner's odds of receiving credits in the first instance is moot and irrelevant. Rather, the question presented in this Petition is whether the retroactive change in the duration of Petitioner's incarceration effected by the 1992 Act violates the constitutional prohibition on ex post facto laws.

Respondents raise in their opposition brief for the first time a new state statutory interpretation argument. In accordance with its general practice, the Court should not consider this argument. Regardless, Respondents' belated state law argument has already been resolved by the Florida Supreme Court.

Effectively, Respondents ask the Court to create a new "overcrowding" exception to the Ex Post Facto Clause. Such an erosion of a bulwark against arbitrary and vindictive government deprivations of liberty is particularly inappropriate under these circumstances. Prison "overcrowding" is a crisis of the government's own making, which it could readily resolve without resort to unconstitutional measures.

Petitioner does not seek to curtail Florida's power to respond to crime as it sees fit or to change the punishment prescribed for crimes, so long as any punishment changes operate prospectively. Consistent with the Ex Post Facto Clause, Florida could repeal prospectively all early release gain-time mechanisms. What the Ex Post Facto Clause prohibits is the change effected by the 1992 Act: a retroactive increase in the quantum of punishment prescribed for a crime, based solely on Petitioner's offense of conviction.

I. RESPONDENTS' PRINCIPAL ARGUMENT RESTS ON A FUNDAMENTAL MISAPPREHENSION OF EX POST FACTO LAW AND WHAT IS AT ISSUE IN THIS CASE.

The majority of Respondents' argument focuses on the question of whether the overcrowding gain-time statutes in place from 1985 to 1991 were sufficient to allow Petitioner to form a reasonable, definite expectation of reduced incarceration time. Mathis Br. 17-30; Butterworth Br. 15-25. Respondents' second general argument is related, and centers on the state's reasons for creating overcrowding credits. *See* Mathis Br. 2-9; Butterworth Br. 2-9. Both of those questions are irrelevant to the issue in this case: whether the 1992 Florida statute that retroactively increased the duration of Petitioner's incarceration—based solely on his offense of conviction—violated the Ex Post Facto Clause.

A. Respondents' argument that, at the time of Petitioner's offense, the future award of overcrowding credits was speculative and contingent is not only irrelevant, it misunderstands fundamentally the Ex Post Facto inquiry. Petitioner is challenging the 1992 Act's retroactive *revocation* of *actually awarded* provisional release credits. Respondents' arguments regarding the contingent nature of the *award* of overcrowding gain-time credits under the statutes in effect from 1985 to 1991 are misplaced because Petitioner is not challenging those statutes or the pre-conditions they placed on the award of gain-time credits.[1] The Ex Post Facto Clause has no application to changes in penal laws that operate prospectively, like the prison overcrowding condition precedent to the award of overcrowding gain time. What the Ex Post Facto Clause prohibits—and what Petitioner challenges here—is a retroactive increase in the punishment prescribed for a crime.

[1] In all events, arguments regarding whether the award of provisional release credits was speculative at some point in time are now moot. All parties agree that Petitioner actually received 1860 days of those credits.

Under *Morales*, the test is whether the statute that canceled retroactively Petitioner's previously awarded early release credits—the 1992 Act—"produce[d] a sufficient risk of increasing the measure of punishment attached" to Lynce's crime. *California Dep't of Corrections* v. *Morales*, 115 S. Ct. 1597, 1603 (1995). The circumstances of this case are quite different from those in *Morales*, where there was a real question regarding what effect, if any, the challenged statute would have on the duration of the prisoner's incarceration. *See id.* at 1597-98.[2] Here, there is no question that the challenged statute—the 1992 Act—as applied, retroactively increased the duration of Petitioner's incarceration. Petitioner was released unconditionally in October 1992, and reincarcerated for his original offense in June 1993, pursuant to the 1992 Act. The "risk" of increased incarceration due to the 1992 Act was an absolute 100% certainty. Florida law as it existed prior to the 1992 Act mandated that the Department of Corrections release Petitioner in October 1992. *See* II *infra*. As a result of the 1992 Act, Petitioner was forced to spend more than five additional years

[2] In *Morales*, the statute at issue reduced the frequency of parole hearings for certain offenders. Morales challenged the statute, claiming that it reduced the likelihood that he would receive parole, and thus increased his punishment. *Morales*, 115 S. Ct. at 1602-03. The prisoner in *Morales* had not yet been awarded parole, so the Court conducted an inquiry into the likelihood that the reduced frequency of parole hearings would actually diminish his prospects for early release on parole. It was in this context that the Court found the challenged statute created "only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes." *Id.* at 1603. By contrast, at the time of the 1992 Act, Mr. Lynce had already received Florida's analog to a parole date, a mandatory release date determined by the award of early release gain-time. *See* § 921.001(10), Fla. Stat. (Supp. 1992). The determination of his mandatory release date required no speculation or prognostication whatsoever. If Morales had already been granted parole and the challenged statute revoked that parole—and all future eligibility for parole—based solely on his offense of conviction, looking backward to determine his likelihood of obtaining parole in the first instance would have been a pointless exercise.

in prison.[3] The only question in this case is whether that retroactive increase in Petitioner's term of incarceration is consistent with the requirements of the Ex Post Facto Clause. Respondents' attempt to reconstruct the likelihood of an overcrowding gain-time award in the period prior to its actual award is an irrelevant distraction.

B. Florida's motivation for enacting overcrowding release credit statutes is similarly irrelevant. Florida has the power and the authority to prescribe the penalties for violations of state law, so long as those prescriptions operate prospectively. The state's motivation for creating or revising prison sentences, sentencing systems and determinants of the duration of prison time in the first instance has no bearing on whether the retroactive increase in the punishment for selected offenses as a result of the 1992 Act violates the Ex Post Facto Clause.[4]

II. THE 1992 ACT'S REVOCATION OF PETITIONER'S EARLY RELEASE GAIN-TIME CREDITS RETROACTIVELY INCREASED HIS PUNISHMENT BY INCREASING THE LENGTH OF HIS INCARCERATION.

Respondents argue that Petitioner's additional five years' incarceration for the same offense did not consti-

[3] There is no dispute that the 1992 Act, as applied, was retroactive. *See* Mathis Br. 34-37.

[4] Assume, for example that a state enacted a law effective January 1, 1986 providing that a certain crime should be punished by a penalty of no more than five years. Further assume that the enacting legislature believed that the severity of that crime actually warranted a 10-year sentence, but that because of prison population and fiscal resource constraints, it was necessary to prescribe a five-year sentence. Finally, assume a person is convicted of that crime in 1986 and sentenced to five years in prison. If the state increased retroactively the penalty for the prisoner's crime to ten years in 1991, the fact that the five-year sentence prescribed at the time of the offense was motivated in part by overcrowding concerns would be entirely irrelevant to an Ex Post Facto challenge. Similarly, the fact that Florida's motivation in enacting various types of gain-time was to respond to prison overcrowding is irrelevant to the question of whether it may retroactively revoke those credits once they have been awarded.

tute increased punishment because the award of overcrowding gain-time credits was discretionary in the first instance. Mathis Br. 30-34. This argument proves too much. Ultimately, the use of every type of early release gain-time in Florida is discretionary, as are parole decisions in states retaining a parole system.[5] Following Respondents' argument, the government could abolish retroactively all gain-time, or retroactively abolish parole, without implicating the Ex Post Facto Clause. The clear import of *Morales* is that the government may not retroactively *abolish* parole (or parole eligibility) or mechanisms providing for early release—if the government constitutionally could abolish parole retroactively for certain offenders, *a fortiori* the government could enact a statute that unambiguously made it substantially less likely that those offenders would be granted parole. *See Morales*, 115 S. Ct. 1597 (addressing degree of likelihood of effect

[5] Respondents' attempts to make technical distinctions between different types of gain-time based on a discretionary/mandatory distinction are unavailing. The Florida Supreme Court has expressly held that basic gain-time, which Respondent Mathis characterizes as "automatic" and "mandatory," is ultimately discretionary. *Waldrup* v. *Dugger*, 562 So. 2d 687 (1990). As they must in light of *Weaver* v. *Graham*, 450 U.S. 24 (1981), Respondents concede that basic gain-time is a determinant of punishment, and its retroactive revocation a violation of the Ex Post Facto Clause. Although Respondent Mathis attempts to distinguish between "gain-time" and overcrowding early release "credits," the Florida Legislature did not draw such fine distinctions. *See* § 944.276, Fla. Stat. (1987) (Lodg. Doc. 17) ("Administrative *gain time*"—which the Florida Supreme Court has held is indistinguishable from provisional release credits—is triggered when prison population exceeds 98% of capacity). Nor does the Florida Attorney General appear to endorse this semantic distinction. *See* Butterworth Br. 1 ("[Provisional release credits] are widely regarded as a form of 'gain time,' a term for a variety of early release mechanisms . . ."). Finally, contrary to Respondent Mathis' contention, the clearest statement in the otherwise inconclusive legislative history demonstrates that the legislature considered all release credits to be types of "gain-time." *See* Senate Staff Analysis and Economic Impact Statment for SB 210 (rev. Mar. 7, 1989) (Lodg. Doc. 48) ("Florida law currently authorizes four different types of gain time: basic, incentive, meritorious, and provisional credits.").

on parole decision necessary to show Ex Post Facto violation).

A. Conspicuously absent from Respondents' briefs is any mention whatsoever of the statute governing Petitioner's release, § 921.001, Fla. Stat. (Supp. 1992). Respondents' failure to discuss this statute is telling, because the statute plainly demonstrates that provisional release credits ("PRC"), once awarded, were a central, mandatory determinant of the duration of the recipient's incarceration. Because Respondents' unsupported assertions may have confused the role of PRC in determining the length of Petitioner's incarceration, a careful step-by-step review of the actual governing statutes is necessary to clarify the requirements of the law of Florida during the relevant period. The contemporary statute governing the release of Florida prisoners from custody provided, in relevant part:

> A person who is convicted of a crime committed on or after October 1, 1983, but before October 1, 1988, *shall be released from incarceration* only:
>
> (a) Upon expiration of his sentence;
>
> (b) Upon expiration of his sentence as reduced by accumulated gain-time;
>
> (c) As directed by an executive order granting clemency; or
>
> (d) *Upon attaining the provisional release date.*

§ 921.001(10), Fla. Stat. (Supp. 1988) (Lodg. Doc. 12) (emphasis added).[6] The statutory language is clear and mandatory—a prisoner *shall* be released on his provisional release date. "Provisional release date," in turn, is defined in the provisional release credit statute:

> At such time as provisional credits are granted, the Department of Corrections *shall establish a provisional release date* for each eligible inmate incarcerated, which will be *the tentative release date less any provisional credits granted.*

[6] The text of Section 921.001(10), Fla. Stat. remained unchanged from 1988 to 1993.

§ 944.277(3), Fla. Stat. (Supp. 1992) (Lodg. Doc. 24) (Pet. Br. App. 3a) (emphasis added). Finally, the governing statute defines "tentative release date" as

> the date projected for the prisoner's release from custody by virtue of gain-time granted or forfeited as described in this [gain-time statute]. The initial tentative release date shall be determined by deducting basic gain-time granted from the maximum sentence expiration date. Other gain-time shall be applied when granted or restored to make the tentative release date proportionately earlier; and forfeitures of gain-time, when ordered, shall be applied to make the tentative release date proportionately later.[7]

§ 944.275(3)(a), Fla. Stat. (1987) (Lodg Doc. 17). Together, the three quoted statutes make clear the formula mandated by Florida law for determining the duration of a prisoner's incarceration: A prisoner's mandatory release date is determined by the guideline sentence imposed by the sentencing judge, less all gain-time he has been awarded, including provisional release credits and all other overcrowding gain-time. The interaction of the three statutes also shows the integrated nature of the several component determinants of the length of punishment under the Florida system. The statutory sentence range, the sentencing guidelines, and all forms of gain-time operated together as part of an organic whole to determine the length of an offender's incarceration.[8]

[7] The statute later provides that gain-time may be forfeited by prison administrators "[w]hen a prisoner is found guilty of an infraction of the laws of this state or the rules of the department [of corrections]." § 944.275(5), Fla. Stat. (1985 & 1993) (Lodg. Doc. 14, 15); *see* § 944.28. Petitioner committed no such infraction, and Respondents do not here contend that gain-time credits awarded under Section 944.275 were forfeited or rescinded. At issue in this case is the legislative withdrawal of Petitioner's provisional release gain-time credits.

[8] The futility of Respondents' attempt to differentiate between the several integrated statutory determinants of punishment under Florida law is illustrated by the inconsistent arguments of Respondent Mathis. Superintendent Mathis first states that under applicable Florida law, "an offender's actual prison penalty—that is, his

Contrary to Respondents' contention, the provisional release date was not a mere "forecast," it was a non-discretionary, mandatory release date. A careful reading of the relevant statutes reveals that the only contingent or "provisional" feature of provisional release credits was whether they would be granted in the first instance.[9] Once the state decided to award the credits, there was no statutory provision for their revocation under any circumstances. There is simply no support in Florida statutes, or relevant legislative history, for the notion that the state retained discretion to withdraw previously granted provisional release credits if overcrowding should subside.[10]

To be sure, consistent with the Ex Post Facto Clause, the state *could have* created an early release system that prospectively reduced the duration of incarceration only so long as overcrowding persisted. Indeed, in 1989 (effective 1990) the Florida Legislature incorporated into its sentencing system just such a mechanism, entitled "control release," which expressly provides for the adjustment of prisoners' release dates for a variety of reasons, including changes in overcrowding. *See* § 947.146(6)(a)(3), Fla. Stat. (1989). The statute—which remains in effect today

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punishment—was calculated as the actual sentence less the award of *mandatory* gain-time." Mathis Br. 32 (emphasis added). Applying this formula, Mathis continues, Petitioner's "22-year sentence became roughly a 15-year sentence." *Id.* at 32 n.37. On the very next page, Mathis reverses field, claiming that "petitioner cannot show that the punishment for his crimes on the date he committed them was something less than the 22 years to which he was actually sentenced." *Id.* at 33.

[9] Mathis makes much of the fact that the Legislature named the gain-time credits at issue here *provisional* release credits, suggesting without any citation to authority that the mere name of the credits makes such credits insubstantial and ephemeral. Mathis Br. 33. As this Court has made abundantly clear, the label the government affixes to a statute does not immunize it from Ex Post Facto scrutiny. *See, e.g., Collins* v. *Youngblood*, 497 U.S. 37, 46 (1990).

[10] There is no dispute that, absent the 1992 Act, Petitioner's provisional release date was October 1, 1992, the date he was actually released.

—gave the state the prison population management flexibility it desired. Importantly, the change to the sentencing system effected by Section 947.146 does not offend the Ex Post Facto Clause so long as the government applies it prospectively, *i.e.*, so long as it applies only to persons who commit offenses after the statute's effective date. In contrast, what the government may *not* do is what it did to Petitioner—enact a law that increases retroactively the duration of his incarceration for the same offense. *See Miller* v. *Florida*, 482 U.S. 423 (1987); *see also Morales*, 115 S. Ct. at 1603 n.4 (ex post facto analysis of adjustments to mechanisms surrounding sentencing process focuses on whether those adjustments increased prisoner's term of confinement).

Respondents cannot seriously dispute that an increase in the duration of incarceration is an increase in the quantum of punishment. Incarceration—the deprivation of liberty—is, and always has been, the primary form of punishment societies mete out for serious crime. With the exception of capital cases, the crux of virtually every Ex Post Facto case is a claim that the challenged government action had the effect or potential effect of increasing the length of the claimant's term of incarceration. *See, e.g., Morales*, 115 S. Ct. 1597 (petitioner complained that less frequent parole hearings reduced his potential for a shorter term of incarceration through parole).

B. The only distinction between this case and the *Lindsey-Weaver-Miller* trilogy is that the retroactive punishment in this case is more clear, more definite, and more onerous. In *Lindsey*, the statutory change eliminated the low end of the range of incarceration terms that could be imposed for specific crimes. In *Weaver*, the State of Florida reduced the number of gain-time credits that a prisoner was eligible to receive after the effective date of the new statute. In each case, it was possible that the duration of the prisoner's sentence would have been the same under the amended statute as under the statute in effect at the time of his offense. Nonetheless, in both cases the Court held the statutory change violated the Ex Post Facto

Clause. Here, unlike *Lindsey* and *Weaver*, there is no question that the 1992 Act actually increased Petitioner's term of incarceration.

Florida's action in *Miller* is closer to the retroactive change it imposed in the present case. In *Miller*, the state changed the presumptive sentencing range for the petitioner's crime from 3½-4½ years to 5½-7 years. The Court held that this post-offense increase in the "quantum of punishment" violated the Ex Post Facto Clause. *Miller*, 482 U.S. at 433-34. Here, Florida seeks to achieve the same result it achieved in *Miller* by retroactively "adjusting" a different determinant of the duration of his sentence. The result here differs only in its certainty and severity. In *Miller*, the offender faced the *possibility* of an increased sentence of as much as 3½ years (new maximum of seven years less old minimum of 3½). Here, Florida imposed—through the 1992 Act—a *certain* increase in incarceration of more than five years.

III. RESPONDENTS' NEWFOUND ARGUMENT THAT PETITIONER IS NOT ENTITLED TO THE PROTECTION OF THE EX POST FACTO CLAUSE IS BARRED BY THEIR FAILURE TO RAISE IT BELOW; REGARDLESS, IT MISAPPREHENDS BOTH PETITIONER'S CLAIM AND EX POST FACTO LAW.

Respondents raise for the first time in their merits briefs the new argument that the State's retroactive cancellation of Petitioner's early release gain-time credits and the resultant increase in the duration of his incareation is immune from ex post facto scrutiny because the version of the statute under which Petitioner received credits was not in effect at the time of his offense. *See* Mathis Br. 26-30; Butterworth Br. 14-19. Never before in this case, including Respondents' Opposition to Certiorari, have Respondents raised this argument for any court's consideration. Only after the magistrate judge, the district court, and the Eleventh Circuit had ruled, and after this Court granted certiorari, did Respondents see fit to raise this hypertechnical argument drawing distinctions between one

early release statute and the virtually indistinguishable statutes that served as its functional replacements.

A. This belated argument is not properly before the Court, and the Court should follow its sound general practice of refusing to hear arguments raised for the first time in this Court. The Court generally does not address arguments that were not the basis for the decision of the courts below. *Matsushita Elec. Indus. Co.* v. *Epstein*, 116 S. Ct. 873, 880 n.5 (1996). This is particularly true where, as here, the issue involves a question of state law. *See Peralta* v. *Heights Medical Ctr., Inc.*, 485 U.S. 80, 86 (1988). Principles of judicial efficiency, fairness and notice, and inter-system comity militate against allowing Respondents to decline to make this argument before the lower courts, only to raise it for the first time after this Court has granted certiorari, in an attempt to divert the Court from the merits of Petitioner's ex post facto challenge.[11]

B. Even if the Court departs from its general policy and considers Respondents' new argument, the Florida Supreme Court has already resolved the state law issue in Petitioner's favor. As Respondents themselves insist, the interpretation and application of state penal law, including all early release gain-time statutes, is the province of the state judiciary. *See* Mathis Br. 34-38. The state law question of whether there was any relevant substantive difference between emergency gain-time and the two overcrowding release credit statutes that succeeded it is properly decided by Florida state courts. The Florida Supreme Court has decided several ex post facto cases

[11] Exactly four years have elapsed since Petitioner's October 1992 release. As a result of the 1992 Act, Petitioner has spent nearly 3½ of those years in prison. As this Court recently noted, "[w]hen a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights." *Stutson* v. *United States*, 116 S. Ct. 600, 603 (1996). Such "solicitude" is particularly appropriate where, as here, the government allows a case to work its way through the system and then raises an entirely new argument for the first time after this Court has granted certiorari.

arising in the same temporal circumstances, *i.e.*, a prisoner whose offense date pre-dated the enactment of provisional release credits challenging the State's treatment of provisional release credits. In each case, the Florida Supreme Court decided the ex post facto challenge to cancellation of provisional release credits or administrative gain-time. *See, e.g., Griffin* v. *Singletary*, 638 So. 2d 500 (Fla. 1994) (inmate's offense date was prior to enactment of provisional release credits and administrative gain-time statutes, court decided ex post facto challenge to retroactive cancellation of both types of gain-time)[12]; *Ipnar* v. *Singletary*, No. 81,040 (Fla. Apr. 29, 1993)[13]; *see also Herring* v. *Singletary*, 879 F. Supp. 1180 (N.D. Fla. 1995) (petitioner committed offense in 1984, court

[12] In *Griffin* v. *Singletary*, 638 So. 2d 500 (Fla. 1994), a prisoner sentenced in 1986, when emergency gain-time was the only type of overcrowding credit available, challenged the revocation of provisional release credits awarded under the successor statute also at issue in this case. The Court proceeded directly to the question of whether the revocation of provisional credits violated the Ex Post Facto Clause, pausing briefly to note that " 'provisional credits' and 'administrative' gain-time are the same for [ex post facto] purposes . . . The sole purpose of both forms was to reduce prison overcrowding when the correctional system reached ninety-eight percent of its lawful capacity." *Id.* at 501. The Court further noted that although provisional credits were not technically referred to as "gain-time," "the distinction lacks a difference, if only because the two are different names applied to essentially the same thing." *Id.* at 501 n.1.

[13] In *Ipnar*, Respondent Singletary raised the very timing argument he has raised belatedly in this case. *See* Respondent Singletary's Response to Petition for a Writ of Habeas Corpus at 24, *Ipnar* v. *Singletary*, No. 81,040 (Fla. Apr. 29, 1993). Mr. Ipnar committed his offense in 1985, and he challenged the revocation of his provisional release credits. Respondent Singletary argued that Ipnar could not challenge the revocation of provisional release credits because the statute providing for that version of credits was enacted after Ipnar had committed his crime and been convicted and sentenced. *See id.* In an unpublished memorandum opinion, the Florida Supreme Court declined to address this argument, instead proceeding directly to reject Ipnar's ex post facto challenge to the cancellation of provisional release credits. *See* slip op., *Ipnar* v. *Singletary*, No. 81,040 (Fla. Apr. 29, 1993).

decided ex post facto challenge to 1992 revocation of provisional release credits, enacted in 1988). Like federal courts, the Florida Supreme Court will reach a constitutional question only if the case cannot be decided on statutory or other non-constitutional grounds. *Florida* v. *Tsavaris*, 394 So. 2d 418, 421 (Fla. 1981); *see Florida* v. *Mozo*, 655 So. 2d 1115, 1117 (Fla. 1995).[14]

Moreover, even if the Florida Supreme Court had not resolved the issue—which it has—there is no relevant substantive difference between the succeeding versions of overcrowding gain-time. As demonstrated in Respondents' briefs, provisional release credits were part of a series of "overcrowding gain-time" mechanisms created by Florida to respond to the excess of prisoners over prison space. *See* Mathis Br. 3-9; Butterworth Br. 2-7. The three successive statutes in effect during the relevant period all provided for the discretionary award of gain-time when the Florida prison population reached 98% of capacity.[15]

[14] In *Tsavaris*, the petitioner contended that because the Florida Supreme Court had not expressly addressed the application and meaning of the statutory term "interception" in a prior decision regarding the constitutionality of a statute as applied, the Court had not decided the question in the prior case. *Tsavaris*, 394 So. 2d at 421. After acknowledging that the prior decision had not expressly addressed the statutory interpretation question, the *Tsavaris* Court rejected petitioner's attempt to distinguish the prior case, holding "had this Court believed that [the activity at issue in the prior case] did not fit within the term 'interception,' *we most certainly would have decided the case on those grounds*, for the Court will not pass upon a constitutional issue if the case can be decided on other grounds." *Id.* (emphasis added).

[15] Respondent Mathis misstates the relevant statutory parameters in his attempt to dismiss the fact that Florida prisons reached the 98% statutory trigger a month before Petitioner's sentencing. Mathis Br. 28 n.34 (claiming, without citation, that the statutory trigger at the time of sentencing was 99%). At the time Lynce committed the offense, at the time of his plea, and at the time he was sentenced, the statutory trigger for overcrowding credits was 98% of capacity. *See* § 944.598(1), Fla. Stat. (1985) (Lodg. Doc. 27). It was not until after Petitioner was incarcerated that Florida changed the trigger percentage for one type of overcrowding gain-time ("emergency gain-time") to 99%. *See* § 944.598(1), Fla. Stat. (Supp. 1986) (Lodg. Doc. 29).

Only the name and the technical operation of the early release mechanisms changed as one mechanism supplanted its predecessor between 1986 and 1988.[16] The substantive core remained constant—overcrowding credits, when awarded, operated in conjunction with the Florida sentencing guidelines to create a mandatory release date. *See* §§ 921.001, 944.275, 944.277, Fla. Stat. (Supp. 1988) (Lodg. Doc. 11, 17, 19); § 944.276, Fla. Stat. (1987) (Lodg. Doc. 17-18); § 944.598, Fla. Stat. (1985) (Lodg. Doc. 19-21). Florida's changes in the mechanics of awarding gain-time credit in 1987 and 1988 did not violate the Ex Post Facto Clause precisely *because*, with respect to Petitioner, they effected no substantive change in the law. *Compare Waldrup* v. *Dugger*, 562 So. 2d 687 (Fla. 1990) (application of successor gain-time statute to reduce DOC discretion to grant gain-time under statute in effect at time of offense violates ex post facto prohibition) *with Morales*, 115 S. Ct. at 1603 (mechanical changes to sentencing and release procedures are permitted by the Ex Post Facto Clause).[17]

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[16] Respondents' argument that emergency release credits were limited to 30 total days per inmate also misreads the statute. Under the statute, DOC was required to declare a state of emergency, triggering eligibility for the award of emergency credits, "*whenever* the population of the [Florida] correctional system exceeds 98 percent of [its] lawful capacity." § 944.598(*1*), Fla. Stat. (1985) (Lodg. Doc. 27) (emphasis added). If emergency release credits and resulting releases of prisoners were inadequate to bring the prison population below 98% of capacity, DOC would be required to declare another emergency, triggering new eligibility for emergency gain-time. Under the statute, such successive awards of emergency gain-time could occur each time the prison population exceeded 98% of capacity.

[17] Unlike the 1992 Act, the mechanical changes to overcrowding gain-time in 1987 and 1988 made no significant substantive changes. The Florida Legislature also amended the provisional release credits statute in 1989 to add offense-based eligibility exclusions. *See* § 944.277(1)(i) & n.2, Fla. Stat. (1989) (Lodg. Doc. 21). This was the first time since the creation of the system in 1983 that attempted murderers were excluded from eligibility for any type of gain-time. However, because those exclusions expresaly applied prospectively only, they had no substantive effect for prisoners like Petitioner, who committed offenses prior to their enactment. *See id.*

C. Respondents' expectation/reliance argument depends on the erroneous premise that the Ex Post Facto Clause proscribes only laws that thwart a prisoner's subjective expectation at the time of his offense regarding the length of his incarceration. *See* Mathis Br. at 26-30. This crabbed conception is contrary to an unbroken line of this Court's cases stretching to the founding of the Republic, holding that the Ex Post Facto Clause prohibits laws that " 'retroactively . . . increase the punishment for criminal acts.' " *Morales*, 115 S. Ct. 1597, 1601 (1995) (quoting *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990)). The crux of the inquiry is not what a prisoner actually expected—or even what he might reasonably have expected—at the time of sentencing, but rather whether the challenged statute has the effect of increasing the quantum of punishment attached to a crime. *E.g.*, *Miller* v. *Florida*, 482 U.S. 423, 432 (1987).

Respondents' expectation/reliance argument misses the mark for two reasons. First and foremost, reliance is merely one of the *interests* protected by the Ex Post Facto Clause, not a precondition to its application or a necessary *element* of an Ex Post Facto claim.[18] Indeed,

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[18] Respondents correctly recognize that one of the several interests protected by the Ex Post Facto Clause is a general reliance *interest*. *See Miller*, 482 U.S. at 430 (*Calder* found that one purpose of the Ex Post Facto Clause was to ensure that "legislative enactments 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.' ") (quoting *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981)). Although reliance is one interest protected by the Clause, actual reliance has never been held to be a necessary element of an Ex Post Facto claim. With respect to changes in punishment, the test has always been based on effects, *viz.*, whether a law retroactively changes the quantum of punishment attached to a crime. *See, e.g.*, *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990) (original understanding of Ex Post Facto Clause was that "Legislatures may not retroactively . . . increase the punishment for criminal acts"). Moreover, contrary to Respondents' apparent belief, this Court has never held that a Petitioner must show actual subjective reliance in order to demonstrate

reliance is not even the primary interest protected by the prohibition against ex post facto laws. The Framers' primary intention in including the Ex Post Facto Clause in the Constitution was to prevent federal and state legislatures from enacting arbitrary or vindictive legislation. *See Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 389, 396 (1798). Thus, even if the 1992 Act had not invaded the reliance and fair warning interests of Petitioner and similarly situated offenders, its retroactive increase in the punishment for selected crimes would still violate the Ex Post Facto Clause. *Id.*; *see Morales*, 115 S. Ct. 1597.

Second, the 1992 Act did violate the objective reliance interests of Petitioner and similarly situated offenders. At the time of Petitioner's offense and at the time of his plea and sentencing, the law of Florida provided that, under certain conditions, prisoners would receive overcrowding gain-time credits. *See* § 944.598, Fla. Stat. (1985) (Lodg. Doc. 27). Once awarded, those credits would reduce the duration of the recipient's incarceration. *Id.* Absent some violation of the law or prison rules by the recipient, credits awarded were irrevocable. Although the mechanics and procedures for the award of overcrowding gain-time credits changed slightly over time, the basic substance of overcrowding gain-time remained constant. Thus, throughout the seven years at issue in this case (1985 to 1992), Florida prisoners had an objectively reasonable expectation that under certain conditions they would receive early release credits that would reduce the length of their incarceration, and that those credits, once awarded, would not be revoked based on the recipient's original offense of conviction.

The 1992 Act frustrated the reasonable expectations of Petitioner Lynce and nearly 3000 other Florida prisoners by canceling retroactively gain-time credits awarded in accordance with the statutory scheme described above. At least 135 of those prisoners were returned to prison after having been released in accordance with the gain-

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that a retroactive change in the law infringed the reasonable reliance interests protected by the Ex Post Facto Clause.

time statutes.[19] Without fair warning, the 1992 Act violated reasonable reliance and expectation interests created by Florida penal statutes and retroactively increased the punishment of nearly 3000 prisoners.

IV. PRISON ADMINISTRATION CASES HAVE NO APPLICATION TO FLORIDA'S LEGISLATIVE DECISION RETROACTIVELY TO INCREASE THE SUBSTANTIVE PUNISHMENT ATTACHED TO PETITIONER'S OFFENSE.

Respondent Attorney General Butterworth and *amici* states (hereinafter collectively referred to as the "Attorney General") urge that states' prison management concerns require deference to a state's decision to deprive a citizen of basic constitutional rights. *See* Butterworth Br. 26-30; States' Br. 12-15. For good reason, this Court has never held that a state's prison management interests allow it greater latitude retroactively to increase the punishment attached to a crime. For several equally good reasons, this Court should resist Respondents' invitation to dilute the Ex Post Facto Clause's protections against arbitrary deprivations of liberty.

First, unlike all of the cases cited by the Attorney General, which involve the government's rules and regulations governing persons in custody, this case involves the prior determination of whether the government lawfully may continue to incarcerate the Petitioner. *See Turner* v. *Safely*, 482 U.S. 78 (1987) (prison regulation limiting inmates' exercise of First Amendment rights while in prison); *Bell* v. *Wolfish*, 441 U.S. 520 (1979) (same). As these cases note, the day-to-day management of prisons is a difficult and complicated endeavor, and deference to administrators' judgment in such matters is both necessary and appropriate. However, the threshold determination of whether the state may incarcerate a citizen is not a matter of day-to-day prison administration, but a legal

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[19] *See* Letter from Florida Dep't of Corrections (July 9, 1996), Appendix A to Brief of Amicus Curiae Florida Public Defender Association, Inc.

question that falls outside the competence and jurisdiction of prison administrators.[20] Tellingly, the Respondent most competent to address prison management concerns, Corrections Superintendent Mathis, does not make this argument.

Second, the exception the Attorney General advocates would swallow not only the Ex Post Facto Clause, but virtually every other constitutional right of prisoners, while simultaneously eroding ordinary citizens' protections against arbitrary government deprivation of liberty. The Attorney General effectively argues that, to facilitate prison "administration," prison officials and state legislatures should be given complete discretion to increase punishment retroactively, so long as that increase is rationally related to a legitimate penological interest.

The primary penological interest the Attorney General asserts in support of the cancellation of early release credits is protection of public safety. *See* States' Amicus Br. 14-16; Butterworth Br. 28-29. In virtually every ex post facto challenge, the government's action is rationally related to the protection of public safety. For example, few would deny that decisions to incarcerate convicted felons Miller, Weaver, and Lindsey for a longer period of time than that prescribed at the time of their offenses were rationally related to the protection of public safety. Similarly, a government "administrative" decision to execute all prisoners previously convicted of violent crimes would be rationally related to the goal of protecting gen-

[20] The Attorney General suggests that the Court should give the same degree of deference to legislative acts aimed at prison administration. Butterworth Br. 27-28 (citing *Turner* dicta). Even assuming, *arguendo*, that legislatures are entitled to the same type of deference as executive branch administrators, this argument misses the point. Government actions that deprive a citizen of liberty retroactively have nothing to do with prison management or administration, and deference to such actions is not appropriate. *Cf. Collins*, 497 U.S. at 46 (constitutional prohibition of ex post facto laws is aimed at laws " 'whatever their form' " that increase retroactively the punishment for an offense) (citing *Beazell* v. *Ohio*, 269 U.S. 167 (1925)).

eral public safety. However, numerous constitutional protections, including the Ex Post Facto Clause, prohibit such government actions, regardless of whether they bear a rational relation to the protection of public safety.

Third, what Florida is really seeking is an unnecessary waiver of a federally guaranteed constitutional right, in order to fix a resource problem of its own making, which is well within the state's existing power to address. Prison "overcrowding" is not primarily the result of an Act of God or some other exogenous force outside of the state's control.[21] The surplus of prisoners over prison space—"overcrowding"—results from the State's refusal to allocate the additional fiscal resources necessary to accommodate the inevitable increase in prison population created by its punishment decisions. As Respondents acknowledge, this "overcrowding crisis" is not new. *See, e.g.*, Butterworth Br. 3-4 (prison overcrowding crisis has existed since at least the early 1970s). Florida cannot argue at this juncture that overcrowding took it by surprise in the late 1980s.[22]

* * * *

[21] Prison population growth is primarily the gradual and predictable result—maybe even the intended result—of a series of deliberate legislative decisions regarding crime and punishment, including the definition of crimes and increases in the duration of incarceration attached to those crimes. *See, e.g.*, 1988 Fla. Laws ch. 88-131 (expanding habitual offender laws, creating new 15-year mandatory minimum sentences, creating prison sentences for all felonies, including lesser felonies previously subject to non-prison penalties); 1987 Fla. Laws ch. 87-110; 1986 Fla. Laws ch. 86-273, § 1 ("The extent of departure [from sentence prescribed by sentencing guidelines] shall not be subject to appellate review."). Overcrowding occurs when a government is unwilling to pay to construct and maintain sufficient prison space to house the growing prison population resulting from those decisions. While this reluctance is understandable, it cannot justify violation of the Ex Post Facto Clause.

[22] During the 1990s, Florida decided to devote greater resources to new prison construction. As a result, Florida's prison overcrowding crisis has subsided and Florida actually has significant excess prison capacity. *See, e.g.*, Florida Parole Commission Con-

The 1992 Act retroactively increased the punishment prescribed for Petitioner's crime by withdrawing previously awarded early release credits and revoking a statutorily prescribed mandatory release date, based solely on his 1985 offense of conviction. As a result of this retroactive statutory change, Petitioner was reincarcerated for an additional five years. This selective retroactive increase in punishment is prohibited by the Ex Post Facto Clause.

CONCLUSION

For the foregoing reasons and those stated in Petitioner's opening brief, the judgment of the court of appeals should be reversed and the Petition for Writ of Habeas Corpus should be granted.

Respectfully submitted,

Of Counsel:
CARTER G. PHILLIPS
PAUL A. HEMMERSBAUGH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

H. JAY STEVENS
JOEL T. REMLAND *
Federal Public Defender
Middle District of Florida
80 N. Hughey Avenue
Suite 417
Orlando, FL 32801
(407) 648-6338

Counsel for Petitioner

* Counsel of Record

September 30, 1996

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trol Release Weekly Advancement Report (July 3, 1996) (reporting 5369 vacant prison beds, or approximately 8% excess capacity).

No. 95-7452

IN THE

Supreme Court of the United States

October Term, 1996

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Petitioner,

v.

HAMILTON MATHIS, ROBERT A. BUTTERWORTH,
AND HARRY K. SINGLETARY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE ON THE MERITS IN SUPPORT OF RESPONDENT

FRANKIE SUE DEL PAPA
Attorney General of Nevada

ANNE B. CATHCART
Senior Deputy Attorney General
Litigation Division

OFFICE OF THE ATTORNEY GENERAL
Capitol Complex
Carson City, NV 89710
(702) 687-4170

COUNSEL FOR AMICUS CURIAE

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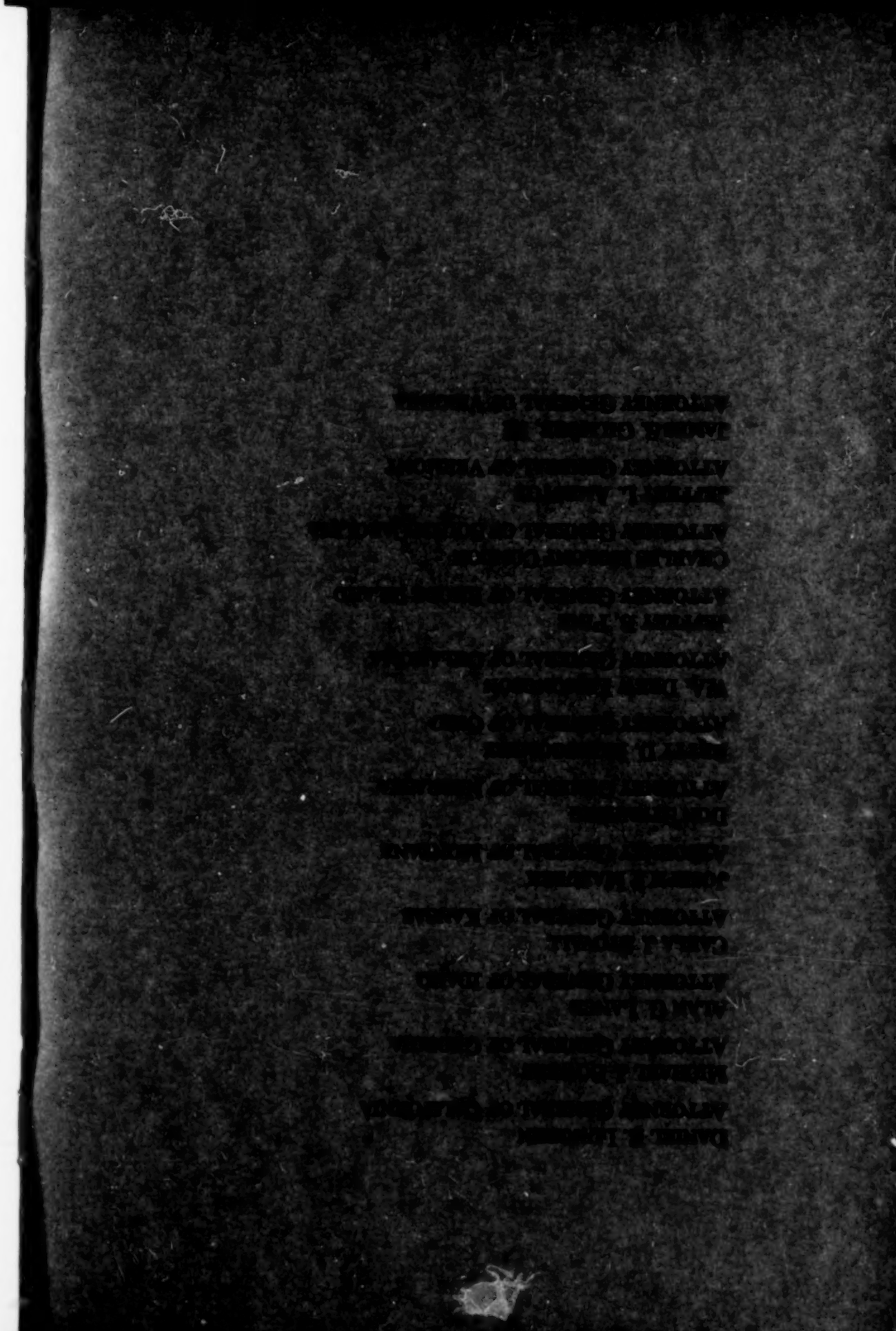

QUESTION PRESENTED

During the years 1988–1993, provisional credits, a form of "gain time" intended solely to relieve prison overcrowding, was awarded to Florida inmates. Between 1988 and 1991, the petitioner was given 1,860 days of provisional credits. Then in 1992, the Florida Legislature amended the provisional credits statute to exclude from eligibility a class of more violent offenders, including Petitioner. The question presented is whether that amendment violated the ex post facto clause of the U.S. Constitution.

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INTEREST OF AMICUS CURIAE

Numerous states across the country have adopted various mechanisms to provide some relief to their prison overcrowding problems. These efforts have met with varying results through use of these mechanisms—some mechanisms have resulted in loss of innocent life by violent offenders released too early. These losses have resulted in further amendments to the prison overcrowding mechanisms. Many of these amendments, such as that to Florida's provisional credit statute, have been met with *ex post facto* challenges. The States joined herein as amicus curiae urge this Court to follow the "purpose and effect" analysis of *Morales* when reviewing these prison overcrowding mechanisms. Review of these amendments to early release mechanisms should recognize the states' legitimate penological interest in controlling prison

overcrowding while protecting the security of its citizens. Accordingly, the amici states would further urge this court to revisit the line of "early release" cases including *Weaver v. Graham*, and to consider these cases under a test which would give deference to the states power to control prison overcrowding.

SUMMARY OF ARGUMENT

This case involves amendment of a remedial statute which was adopted by the legislature to provide the Department of Corrections with an emergency mechanism which could be utilized by the Department, with the approval of the Governor, to reduce prison overcrowding in times when the other mechanisms were unsuccessful in reducing the prison population to the federally mandated level. Petitioner challenges this statute as violative of the *ex post facto* clause. The amici states would submit that the Florida provision does not alter the definition of criminal conduct or increase the penalty by which a crime is punishable so as to violate the *ex post facto* clause. The provisional credit statute is a remedial statute aimed at controlling prison overcrowding and the award of such credits in no sense is tied to any aspect of the original sentence and cannot possibly be a factor at sentencing or in deciding to enter a plea bargain and creates only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes.

The provisional credits at issue in the instant case is distinguishable from the gain time at issue in *Weaver v. Graham*. Unlike the gain time in *Weaver,* the award of provisional credits is not mandatory and the inmate, at the time he creates his crime or is sentenced, has no right to or expectation of such an award of provisional credits. The award of provisional credits is a discretionary, emergency mechanism which will only be awarded if certain conditions occur and the Department, with the approval of the Governor, determines such gain time should be awarded. The award to Petitioner of such gain time was only through an

erroneous interpretation of the statute by the Department of Corrections. This error was subsequently corrected by an opinion of the Florida Attorney General which was later affirmed by the legislature in an amendment to the provisional credit statute. This amendment resulted in the correction of Petitioner's release date. The amendment did not increase Petitioner's sentence; it merely restored the status quo as it existed at the time he committed his crime and was sentenced.

Although this overcrowding mechanism is distinguishable from the gain time discussed in *Weaver v. Graham,* the amici states would ask this Court to revisit *Weaver* and its progeny. The purpose and effect of the gain time statutes at issue in these cases should be considered with deference given to the right of the states to manage and control their criminal justice systems and prisons. The states have a legitimate penological interest in amending their gain time statutes where they do not reflect the legislative intent and result in release of violent prisoners whose early release threatens the safety of the citizens of these states. Accordingly, the amici states would ask this court to adopt a test which recognizes the deference given to states in such matters and looks to the purpose as well as the effect of the statute.

ARGUMENT

This case involves amendments to a remedial statute which was adopted by the legislature to provide the Department of Corrections with an emergency mechanism which could be utilized by the Department, with the approval of the Governor, to reduce prison overcrowding in times when the other mechanisms were unsuccessful in reducing the prison population to the federally mandated level. Petitioner challenges this statute as violative of the *ex post facto* clause. The amici states would submit that the Florida provision does not alter the definition of criminal conduct or increase the penalty by which a crime is punishable so as to violate the *ex post facto* clause. The provisional credit statute is a remedial statute

aimed at controlling prison overcrowding and the award of such credits in no sense is tied to any aspect of the original sentence and cannot possibly be a factor at sentencing or in deciding to enter a plea bargain. The statute creates only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes.

In the instant case, the issue concerns a statute which neither makes criminal that which was previously innocent nor takes away defenses which a criminal defendant had available at the time he committed his crime. The issue here is whether this prison overcrowding statute, intended merely by the state as a discretionary, emergency mechanism to relieve prison overcrowding, should be viewed as a penal statute merely because of the incidental effect it may have on some inmates and their subjective interpretation of the statute.

The Florida Supreme Court discussed the purpose of this provisional credit statute as follows:

> [T]he state's unilateral decision to restrict the "provisional credit" does not trigger the constitutional issues that would be present if some other forms of credits or gain time were at stake. The reason is that provisional credits are not a reasonably quantifiable expectation at the time an inmate is sentenced. Rather, provisional credits are an inherently arbitrary and unpredictable possibility that is awarded based solely on the happenstance of prison overcrowding. Thus, provisional credits in no sense are tied to any aspect of the original sentence and cannot possibly be a factor at sentencing or in deciding to enter a plea bargain.

Griffin v. Singletary, 638 So.2d at 500 (Fla. 1994).

In *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990), this Court reviewed the history of the *ex post facto* clause, noting that:

> Although the Latin phrase "*ex post facto*" literally encompasses any law passed "after the fact," it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them. *Calder v. Bull*, 3 Dall. 386, 390–392, 1 L.Ed. 648 (1798) (opinion of Chase, J.); id., at 396 (opinion of Paterson, J.); id. , at 400 (opinion of Iredell, J.). *See Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987). (FN2) As early opinions in this Court explained, "ex post facto law" was a term of art with an established meaning at the time of the framing of the Constitution. Calder, 3 Dall., at 391 (opinion of Chase, J.); id., at 396 (opinion of Paterson, J.). Justice Chase's now familiar opinion in Calder expanded those legislative Acts which in his view implicated the core concern of the *Ex Post Facto* Clause:
>
> > "1st. Every law that makes an action done *before the* passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives *less*, or different, testimony than the law required at the time of the commission of the offense, *in order to*

> *convict the offender.*" Id., at 390 (emphasis in original).

Collins, 110 S.Ct. at 2718.

This Court noted that the principles of *ex post facto* are so well established that in *Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925), the Court was able to confidently summarize the meaning of the Clause as follows:

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*."

Id., at 169–170, 46 S.Ct. at 68.

Applying these holdings to the instant case, it is clear that the statute in question does not violate the *ex post facto* clause. The statute does not make criminal that which was previously an innocent act, it does not take away any defense previously available to the inmate, and it does not make more burdensome the punishment for the crime. At the time of the inmate's offense, he has no expectation of or right to any provisional credits. The granting of provisional credits is not tied to any aspect of his sentence and may only be granted at some time in the future at the discretion of the Department and Governor if various factors occur. Not only is there no expectation but there is no increase of the sentence. If such credits are granted during the inmate's course of incarceration and then taken away, the sentence is not increased, it merely restores the status quo.

Petitioner argues that this remedial statute is an ex post facto violation because it "disadvantages" or "alters to the detriment" the sentence of the inmate. Petitioner cites a line of cases, including *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981),[1] in support of his analysis. However, the Supreme Court has rejected such arguments. Last year, in *California Department of Corrections v. Morales*, 514 U.S. ___, 131 L.Ed.2d 588, 115 S.Ct. 1597 (1995), this Court reviewed an *ex post facto* challenge to a California statute and noted:

> Our opinions in *Lindsey*, *Weaver*, and *Miller* suggested that enhancements to the measure of criminal punishment fall within the *ex post facto* prohibition because they operate to the "disadvantage" of covered offenders. See *Lindsey*, 301 U.S. at 401, 81 L.Ed. 1182, 57 S.Ct. 797; *Weaver*, 450 U.S. at 29, 67 L.Ed.2d 17, 101 S.Ct. 960; *Miller*, 482 U.S. at 433, 96 L.Ed.2d 351, 107 S.Ct. 2446. But that language was unnecessary to the results in those cases and is inconsistent with the framework developed in *Collins v. Youngblood* , 497 U.S. 37, 41, 111 L.Ed. 2d 30, 110 S.Ct. 2715 (1990). After *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor, as the dissent, seems to suggest, on whether an amendment affects a prisoner's "opportunity to take advantage of provisions

1 *Weaver* is distinguishable from the instant case because it involved a mandatory early release formula which was awarded upon the inmates commitment to the Department of Corrections. The provisional credit provision is an emergency remedial statute which grants the Department of Corrections, with the approval of the Governor, a mechanism to reduce prison overcrowding when the other mechanisms have failed to reduce the prison population to an acceptable level.

> for early release," see post, at ___, 131 L.Ed. 2d, at 602, but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

Id. at 131 L.Ed.2d at 595 (FN3).

The amendment to Florida's provisional credit statute does not alter the definition of criminal conduct, nor does it increase the penalty by which a crime is punishable. It merely makes certain classes of violent inmates ineligible for this credit if awarded to reduce prison overcrowding. Although Petitioner argues that his sentence was increased, the amendment did not increase the penalty attached to the crime when committed, it merely restored the status quo for these violent inmates.

The *Morales* Court distinguishes the holding in *Lindsey* and *Weaver,* noting that the statutes at issue in those cases had the *purpose* and *effect* of enhancing available prison terms, whereas "the evident focus of the California amendment in Morales was merely 'to relieve the [Board] from the costly and time-consuming responsibility of scheduling parole hearings' for prisoners who have no reasonable chance of being released." Id. at 131 L.Ed.2d at 596. (Emphasis added) (Citations omitted) This Court stated that "[g]iven these circumstances, we conclude that the California legislation at issue creates only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes." Id. at 131 L.Ed.2d at 599.

Petitioner wants this Court to focus merely on the ultimate effect of the statute without consideration of the purpose and mechanism of the statute. The amici states would ask this Court to follow the purpose and effect analysis set forth in *Morales* in considering whether this statute should be viewed as penal. Such a position is consistent with the long history

of the Court's consideration of the *Ex Post Facto* Clause as illustrated by the following cases.

In *De Veau v. Braisted* 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960), the Court upheld, against bill of attainder and ex post facto challenges, a law forbidding certain unions employing former felons from collecting dues. In effect, the law barred convicted felons from working on the New York and New Jersey waterfront. In so holding, the Court noted: "[t]he question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession." Id. At 160. (Emphasis added)

"The proof is overwhelming, " the Court continued, "that New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony." Id.

Twenty years later, in *United States v. Halper*, 490 U.S. 435, 109 S.Ct 1892, 104 L.Ed.2d 487 (1989), this Court again considered the issue of punishment in the context of Double Jeopardy, and held:

> To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. See, e.g., *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168, 83 S.Ct. 554, 567, 9 L.Ed.2d 644 (1963) (these are the "traditional aims of punishment"). Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell v. Wolfish*, 441 U.S. 520, 539, n.20, 99 S.Ct. 1861, 1874, n.20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Id. at 109 S.Ct. at 1902.

Petitioner argues that Florida's provisional credit statute creates an *ex post facto* violation because it disadvantages Petitioner or "alters to the detriment" his sentence. This theory of disadvantage at one time was adopted in *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L. Ed. 506 (1883). However, this Court rejected Petitioner's theory in *Collins v. Youngblood*, ___ U.S. ___, 110 S.Ct. 2715 (1990), and clarified the concept of punishment. The Court stated:

> This analysis is consistent with the Beazell framework. A law that abolishes an affirmative defense of justification or excuse contravenes Art. I. § 10, because it expands the scope

of a criminal prohibition after the act is done. It appears, therefore, that Justice Washington's reference to laws "relat[ing] to the offense or its consequences" was simply shorthand for legal changes altering the definition of an offense or increasing a punishment. His jury charge should not be read to mean that the Constitution prohibits retrospective laws, other than those encompassed by the Calder categories, which "alte[r] the situation of a party to his disadvantage." Nothing in the *Hall* case supports the broad construction of the ex post facto provision given by the Court in *Kring*.

It is possible to reconcile *Kring* with the numerous cases which have held that "procedural" changes do not result in ex post facto violations by saying that the change in Missouri law did take away a "defense" available to the defendant under the old procedure. But this use of the word "defense" carries a meaning quite different from that which appears in the quoted language from Beazell, where the term was linked to the prohibition on alterations on "the legal definition of the offense" or "the nature or amount of the punishment imposed for its commission." The "defense available to Kring under earlier Missouri law was not one related to the definition of the crime, but was based on the law regulating the effect of guilty pleas. Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge; it had changed its law respecting the effect of a guilty plea to a lesser included offense. The holding in *Kring* can only be justified if the *Ex Post Facto* Clause is thought to include not merely the *Calder* cate-

> gories but any change which "alters the situation of a party to his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases. We accordingly overrule *Kring*.

Id. At 497 U.S. at 49. Petitioner's argument is no longer viable and should be rejected by this court. The relevant issue is whether the amendment increases the punishment attached to the crime at the time Petitioner committed his crime. Although Petitioner was subsequently granted provisional credits during his incarceration and these credits were later taken away as a result of the amendment, Petitioner's sentence cannot be said to be increased. The sentence imposed was not made greater; the amendment merely restored the status quo as it was at the time the crime was committed.

Morales concludes a series of cases which have upheld the initial concept of the *ex post facto clause*. In *Morales*, the Court considered a statute which provided a change for inmates in the frequency with which they would be provided with parole hearings. The Court held that this amendment created only the "most speculative and attenuated possibility of increasing the measure of punishment for covered crimes" and therefore was not of the degree necessary to violate the *ex post facto* clause.

The amici states would urge the Court to uphold this concept of punishment which looks at the purpose and effect of the statute, while at the same time upholding the right this Court has reserved to the states to manage and control the criminal justice system and prisons within their states. As this Court noted recently in *Lewis v. Casey*, ___ U.S. ___, 116 S.Ct. 2174 (1996), a case involving an inmate's constitutional right of access to courts:

> The District Court made much of the fact that lock down prisoners routinely experience delays in receiving legal materials or legal assistance, some as long as 16 days, but so long as they are the product of prison regulations reasonably related to legitimate penological interests, such delays are not of constitutional significance, even where they result in actual injury (which, of course, the District Court did not find here).
>
> Second, the injunction imposed by the District Court was inordinately—indeed, wildly—intrusive. There is no need to belabor this point. One need only read the order, to appreciate that it is the ne plus ultra of what our opinion have lamented as a court's "in the name of the Constitution, becom[ing]...enmeshed in the minutiae of prison operations."
>
> Finally, the order was developed through a process that failed to give adequate consideration to the views of state prison authorities. We have said that "[t]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors...also require giving the States the first opportunity to correct errors made in the internal administration of their prisons.

Lewis at 2185.

This Court has long upheld the deference which must be given the states in control of its prisons. See *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987) and *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979). Courts have "accorded wide-ranging deference [to prison administrators] in the adoption and execution of policies and practices that in their judgment

are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U. S. at 547. Such deference is especially appropriate with respect to the primary state interest of peace and security within the prison facility. *Pell v. Procunier*, 417 U.S. 817, 94 S. Ct. 2800 (1974). The justification for this deference include the complexity of prison management, the fact that responsibility therefore is necessarily vested in prison officials, and the fact that courts are ill-equipped to deal with such problems. *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800 (1974). In *Bell v. Wolfish*, the Court again spoke of the "wide-ranging deference" to be accorded the judgment of prison officials when dealing with security concerns:

> Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response of these considerations, courts should ordinarily defer to their expert judgment.

Bell, 441 U.S. at 547–48 (quoting *Pell*, 417 U.S. at 827).

It is this deference which we now ask this Court to uphold in this area of prison overcrowding—an issue of critical importance to the amici states. Prison overcrowding has been a major problem throughout the states for the last decade and has brought about protracted litigation, great expense, and concern to the states. The states have adopted various mechanisms to control this overcrowding at additional cost and an increased threat to the safety of citizens in these states. On a number of occasions, these mechanisms, adopted to relieve the prison overcrowding, have resulted in the loss of innocent life at the hands of dangerous criminals released too early through these mechanisms. It is with these grave concerns that the amici states urge this court to uphold the test which will focus on both the purpose and the effect, while

giving deference to the penological interests articulated by the states.

As the Court noted in *Morales*, the essence of ex post facto is that the person is put on notice before he is punished. Where the statute is remedial and where the sting of punishment is so speculative and remote, it cannot be said to be punishment or that the inmate has a reasonable expectation of such incidental benefit. The provisional credit provision at issue in this case is an emergency mechanism enacted strictly to be used by state prison officials when and to the extent necessary to relieve prison overcrowding. It was not a mandatory provision such as the gain time provisions seen in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981),[2] nor was it automatically part of the sentencing formula calculated upon entry into the Department of Corrections. It was strictly an emergency mechanism to be used at the discretion of the prison officials. The inmate had no expectation of such credits upon entry into the system and any benefit or disadvantage can only be seen as incidental to the emergency of prison overcrowding at which the statute was aimed.

Although the provisional credit statute was initially mistakenly applied by the Department of Corrections to various classes of inmates on some occasions, this mistake was soon brought to the attention of the Florida Attorney General

---

2 *Weaver* does not address the issue of deference. The amici states would urge this court to revisit *Weaver* and the related cases in light of this deference issue. Many of these early release mechanisms have resulted in serious crimes being committed by violent inmates being released too early. Unfortunately, by the time such problems have been brought to the attention of the state legislators, the courts have invalidated amendments to correct such deficiencies as violative of the *ex post facto* clause. Such results have failed to address the states interest in correcting such statutory deficiencies in light of a legitimate penological interest. The amici states would urge this Court to revisit these cases viewed in terms of the exercise of a legitimate penological interest.

upon notification of the impending release of some of the more violent inmates to which the legislature had not intended such credits to apply. Upon receipt of notification, the Attorney General corrected the error and subsequent remedial legislation was adopted to correct this statute. This action goes to the very essence of the state's authority to control its prison overcrowding while at the same time protecting the safety of its citizens. It is the exercise of the state's powers in response to a legitimate penological interest. To hold otherwise would allow the inmate to create a liberty interest through subjective intent while ignoring the purpose and effect of the statute. It would also allow the inmate to raise this constitutional provision to a higher level than any other constitutional provision while other provisions must yield to legitimate penological interests of the state. To allow the inmate to create a liberty interest through such a speculative remedial statute, merely because some incidental disadvantage may subsequently attach, is inconsistent with this Court's holding in *Morales* and the history of the ex post facto clause.

CONCLUSION

For the foregoing reasons, the decision of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

FRANKIE SUE DEL PAPA
Attorney General of Nevada

ANNE B. CATHCART
Senior Deputy Attorney General
Litigation Division

OFFICE OF THE ATTORNEY GENERAL
Capitol Complex
Carson City, NV 89710
(702) 687-4170

COUNSEL FOR AMICUS CURIAE

(10)

No. 95-7452

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

KENNETH LYNCE,

Petitioner,

v.

HAMILTON MATHIS, SUPERINTENDENT,
TOMOKA CORRECTIONAL INSTITUTION, *et. al,*

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE,* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

Lisa B. Kemler*
317 South Patrick Street
Alexandria, Virginia 22314
(703) 684-7900

Baya Harrison, III
Silver Lake Road
Post Office Box 656
Monticello, Florida 32345
(904) 997-8469

* Counsel of Record for *Amicus Curiae,*
National Association of Criminal Defense Lawyers

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

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QUESTION PRESENTED

Whether amended Florida penal statute §944.277 (1992) violates the constitutional prohibition against *ex post facto* laws by withdrawing early release credits previously awarded to petitioner under the pre-amendment version of the statute, where that withdrawal was based on petitioner's 1986 offense of conviction.

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BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 9,000 attorneys and affiliate members including representatives from all fifty States. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the House of Delegates. The NACDL was founded in 1958 to advance the quality of the defense of the rights of accused persons, as well as to advocate the preservation of constitutional

rights in this country. Among the NACDL's stated objectives is the promotion of the proper administration of justice. The NACDL seeks when appropriate to be a voice for the rights of the clients of its members. Many of those clients, like petitioner in the case at bar, are indigent, incarcerated and unable to defend themselves against arbitrary and politically popular governmental action which contravenes the Constitution of the United States of America. All parties have consented to the filing of this amicus curiae brief pursuant to Rule 37.3(a) of the Supreme Court Rules.

STATEMENT

The NACDL adopts the statement of the facts and the course of the proceedings below as set forth in the brief on the merits of the petitioner, Kenneth Lynce, emphasizing certain matters set out herein.

As of October 27, 1985, the date of petitioner's crimes (attempted first degree murder and other offenses), the State of Florida had prospectively eliminated parole[1] and had begun to substitute sentencing guidelines and various forms of early release credits which operated to reduce the actual time an inmate would remain incarcerated (see for example, §944.598, Fla. Stat. (1983) regarding "emergency gain time"). During the period of his confinement, petitioner became eligible to earn "administrative gain time" and "provisional release credits" pursuant to the provisions of §944.276, Fla. Stat. (1987) and §944.277, Fla. Stat. (Supp. 1989), respectively. The various types of early release credits were awarded based upon the inmate's adherence to the Department of Corrections' ("the department's") rules and a determination by the State's executive branch that the prison system was nearing or had reached lawful capacity.

[1] §921.001(10)(a), Fla. Stat. (1983) eliminated parole eligibility for persons whose crimes were committed after October 1, 1983.

As a result of prison overcrowding and petitioner's adherence to the department's rules and regulations, the petitioner, per the provisions of §944.276, Fla. Stat. (1987) and §944.277, Fla. Stat. (Supp. 1989), was granted a total of 2,195 days of credits toward early release.[2] (J.A. 33, 50) On October 1, 1992, he was set free. (J.A. 50)

A 1992 amendment to §944.277, Fla. Stat. eliminated convicted murderers from eligibility to receive provisional release credits. (J.A. 51) At the end of that year, the Florida Attorney General issued 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992) holding that the 1992 amendment should be applied retroactively. As a result, the department canceled all credits previously earned by inmates now deemed covered by the 1992 exclusions, withdrew the 1,860 days of provisional credits[3] earlier awarded to petitioner, obtained a warrant for his arrest and caused him to be returned to state prison. (J.A. 51, 52) The retroactive cancellation of petitioner's credits resulted in a new tentative release date ("TRD") of May 19, 1998. (J.A. 52)

SUMMARY OF ARGUMENT

In Florida, state statutes providing for the ability of prisoners to earn administrative gain time and provisional credits are akin to statutes enabling those same prisoners to earn basic and incentive gain time -- at least insofar as the constitutional prohibition against *ex post facto* laws is concerned. The 1992 revision of §944.277, Fla. Stat. which, as applied, caused the Florida Department of Corrections to retroactively cancel provisional credits previously awarded to petitioner and force him back into prison was not lawful. This Court's

[2] Petitioner's actual release date was also advanced by the accumulation of basic and incentive gain time provided for per the provisions of §§944.275(4)(a) and (b), Fla. Stat., respectively.

[3] As a result of new legislation effective June 17, 1993, 335 days of administrative gain time previously awarded to petitioner were also canceled. (J.A. 51.)

decisions in *California Dept. of Corrections v. Morales*, 514 U.S. ____; 181 L. Ed.2d 588 (1995) and *Collins v. Youngblood*, 497 U.S. 37 (1990), do not alter the fact that state laws such as the 1992 amendment to §944.277, Fla. Stat., which retroactively increases the quantum of punishment attached to a sentence, cannot pass constitutional muster simply by being labeled "procedural" mechanisms for administrative prison population control. As this Court stated in *Weaver v. Graham*, 450 U. S. 23, 29 (1981), "[c]ontrary to the reasoning of the Supreme Court of Florida, a law need not impair a 'vested right' to violate the *ex post facto* prohibition." Thus, while provisional credits may not constitute a vested right and while petitioner may have acquired them by virtue of the grace of the Florida legislature, he earned them nevertheless in reliance upon the very laws that same legislature chose to enact.

ARGUMENT

A. Provisional Credits are akin to basic and incentive gain time under Florida law. Florida's history of retroactively withdrawing the ability to earn same is vindictive and violates the *ex post facto* clause of the United States Constitution.

Article I, section 10, clause 1, United States Constitution, as discussed in depth in *Weaver v. Graham*, 450 U.S. 24 (1981), is a restraint on "State" action. It speaks to substance over form in providing that "(n)o State shall...pass any *ex post facto* Law." It is not concerned with the *guise* used by the state to alter "the consequences attached to a crime already completed..." but whether the effect of the "law" is "a change (in) the quantum of punishment." *Weaver v. Graham*, 450 U. S. at 33.

Thus in *Weaver*, this Court stated:

> [I]t is the effect, not the form, of the law that determines whether it is *ex post facto*. The critical question is whether the law changes the legal consequences of acts completed before its effective date.

450 U.S. at 31. Of equal importance, "[t]he ban (on state *ex post facto* laws) also restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.* at 29. (Citations omitted.)

Unfortunately, the State of Florida, often based upon opinions promulgated by its attorneys general, has a history of first enacting early release statutes for Florida prisoners then arbitrarily attempting to negate the results of its own laws retroactively -- if not with seeming disregard for -- at least notwithstanding the *ex post facto* clause of the United States Constitution. The practical result has been a significant increase in the quantum of punishment to the detriment of thousands of prisoners. The enactment of §944.277(1), Fla. Stat. (1992 Supp.) by the Florida Legislature, and its retroactive application, which resulted in the cancellation of some 1860 days of early release credits previously earned by petitioner, his arrest and return to prison -- is but another chilling example of the State's disregard for the United States Constitution and that arbitrary history. It should not be countenanced by this Court.

Weaver involved changes in Florida's basic[4] gain time statute enacted after the date of the defendant's crime. This Court made it absolutely clear that, even though gain time was not a "part of the original sentence and, thus, no part of the punishment annexed to the crime at the time petitioner was sentenced" (450 U.S. at 31), basic gain time "substantially alters the consequences attached to a crime completed and therefore changes 'the quantum of punishment'." *Id.* at 33

---

[4] Basic gain time for petitioner amounted to an automatic 10 days/month or one-third off his total sentence for good behavior. See §944.275((4)(a), Fla. Stat. (1978).

citing *Dobbert v. Florida*, 432 U.S. at 293-94. As such, the Court held that the statute "is a retrospective law which can be constitutionally applied to petitioner only if it is not to his detriment." *Id.* The Court added:

> Whether a retrospective state criminal statute ameliorates or worsens conditions imposed by its redecessor is a federal question. *Lindsey v. Washington,* supra, at 400. See *Malloy v. South Carolina*, 237 U.S. at 184; *Rooney v. North Dakota*, 196 U.S., at 325. The inquiry looks to the challenged provision, and not to the particular individual. *Dobbert v. Florida,* supra, at 300; *Lindsey v. Washington,* supra, at 401; *Rooney v. North Dakota*, supra, at 325. Under this inquiry, we conclude § 944.275 (1) is disadvantageous to petitioner and other similarly situated prisoners. On its face, the statute reduces the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks. By definition, this reduction in gain-time accumulation lengthens the period that someone in petitioner's position must spend in prison. In *Lindsey v. Washington,* supra, at 401- 402, we reasoned that '[i]t is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term.' *Here, petitioner is similarly disadvantaged by the reduced opportunity to shorten his time in prison simply through good conduct.*

Weaver, 450 at 33-34. (Emphasis added.)

For the same reasons, the retroactive application of §944.277, Fla. Stat. (1992), like the basic gain time law under attack in *Weaver*, "constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment. This result runs afoul of the prohibition against *ex post facto* laws." *Weaver*, 450 U.S. at 35-36.

In *Lowry v. Parole Commission*, 473 So.2d 1248 (Fla. 1985), the Supreme Court of Florida expedited the disposition of an inmate's habeas corpus/mandamus petition after the Florida Parole Commission denied him (and effectively hundreds of other similarly situated prisoners) eligibility for parole as a result of an erroneous attorney general's opinion. *See* Op. Att'y Gen. 85-11 (February 13, 1985). This opinion, which flew in the face of the pertinent parole statutes and more than 20 years of Commission action, provided that "...a prisoner serving consecutive sentences is not eligible for parole if he is under a sentence he has not yet begun to serve." *Lowry*, 473 So.2d at 1249. After examining the relevant statutes, the court concluded that the attorney general's opinion "does not represent legislative intent." *Id.* at 1250. Lowry's parole eligibility was reinstated.

In *Waldrup v. Dugger*, 562 So.2d 681 (Fla. 1990), and *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989), the courts reviewed Florida's incentive gain time law, §944.275, Fla. Stat., and specifically the contention that the department's discretionary authority rendered it immune to legal challenge when the department decides to curtail incentive gain time. These cases are relevant since the department advances essentially the same argument in the case at bar by claiming that administrative gain time and provisional release credits are simply discretionary "mechanisms for reducing the prison population for the administrative convenience of the Department of Corrections." (J.A. 39.) In *Waldrup* the Supreme Court of Florida stated:

> It is well established that a penal statute violates the ex post facto clause *if, after a crime has been committed, it increases the penalty attached to that crime.* The United States Supreme Court clearly

established this principle in the early case of *Weaver v. Graham*, 450 U.S. 24, 28, 101 S.Ct. 960, 963,67 L.Ed.2d 17 (1981). (Other citations omitted.)

> The policy underlying this prohibition is "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Id., 450 U.S. at 280-29, 101 S.Ct. at 963-64 (citing *Dobbert v. Florida*, 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L. Ed. 2d 344 (1977). (Other citations omitted.)
>
> *A retroactive law, however, is not ex post facto unless two critical elements are present*: The law must apply to events occurring before its enactment, and it must disadvantage the offender. (Citations omitted.)

Waldrup, 562 So.2d at 691. In applying the first of the "two critical elements" to incentive gain time, the court said in part:

> We have no doubt that both the *incentive* and basic gain-time statutes challenged by *Waldrup* contain the first of these elements.
>
> * * *
>
> Both of these gain-time revisions, then, apply to a large class of inmates like *Waldrup whose offenses occurred before* June 1983, when the act took effect.

Id. (Emphasis added.)

Likewise, in *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989), *supra*, the court stated:

> The State contends that basic gain time is fundamentally different than incentive gain time because basic gain time is automatically earned by prisoners, while incentive gain time is earned only at the discretion of prison officials. Because incentive gain time is discretionary in nature, the State contends that petitioner has no right to receive incentive gain time and that the State therefore can alter the method by which incentive gain time is calculated without violating the ex post facto clause of the Constitution.

Id. at 1499. Since Raske did have a right -- a constitutional right -- not to have his ability to earn incentive gain time stripped from him -- the Court found that "*we do not find the State's argument to be persuasive.*" *Id.* (Emphasis added). Finding that its decision was "controlled by the principles announced by the Supreme Court in *Weaver v. Graham*," the Eleventh Circuit recognized that the ability to earn incentive gain time was a privilege granted by the legislature ("the duties that allow a prisoner to earn such gain time are a matter of legislative grace") not the department. *Id.* at 1499. At the time that Raske committed his crime, §944.275(4)(b), Fla. Stat.(1978) was controlling and afforded him the right to incentive gain time. Thus, even though that statute contained the word "may," the Court stated:

> We see no fundamental distinction between the conditions that a prisoner must satisfy to receive basic gain time and the conditions that a prisoner must satisfy to earn discretionary gain time. In both cases, the department decides in its sole discretion whether the prisoner has behaved well enough or worked diligently enough to earn gain time.

Raske, 876 F.2d at 1497, 1499. The Court further noted:

> We agree, of course, that incentive gain time is discretionary. We note however, that this discretion is not complete. Thus, for example, the State does not contend that a prisoner who has performed his work in an outstanding manner can legally be denied incentive gain time for that work, despite its so-called "discretionary" nature. See *Pettway v. Wainwright*, 450 So.2d 1279 (Fla. 1st DCA 1984).

Id. at 1499, n. 6. The *Raske* court concluded:

> Thus even though the opportunity to earn incentive gain time is dependent on the grace of the legislature and the availability of jobs, we conclude that if the State affords its inmates such work, it is bound to reward prisoners for their services at a gain time rate at least equally advantageous to that in effect at the time those prisoners' offenses.

Id. at 1499.

Likewise, the opportunity for petitioner herein to earn provisional credits was dependent on the grace of the Florida Legislature, an overcrowded prison population and his ability to conform to the rules and regulations of the department. Having earned provisional credits pursuant to the statutory scheme the Florida Legislature itself established, that body cannot retroactively strip him of those provisional credits and force him back into prison.[5]

In *Miller v. Florida*, 482 U.S. 423 (1987), the petitioner challenged sentencing guidelines which came into effect after his crime occurred claiming that using the guidelines to determine his sentence constituted an *ex post facto* violation. Application of the new guidelines caused him to fall into a 5 and 1/2 to 7 years presumptive sentence range instead of a 3 and 1/2 to 4 and 1/2 years range. Finding such application to violate the *ex post facto* clause, this Court held:

---

[5] Despite the holding in *Raske* regarding incentive gain time, the Florida Attorney General recently issued Op. Att'y Gen. 96-92 (March 20, 1996) to the effect that the department had the right on its own to retroactively terminate the ability of certain inmates (violent and sex offenders) to earn incentive gain time. As a result, the department, on April 21, 1996, adopted Fla. Admin. Code Rule 33-11.0065 (1996) barring those inmates from earning incentive gain time in the future. This rule is the subject of a mandamus petition pending in the Supreme Court of Florida. *See Gwong v. Singletary*, Supreme Court of Florida Case No. 87,824.

> A law is retrospective if it "changes the legal consequences of acts completed before its effective date." Weaver, supra, at 31, 67 L. Ed. 2d. 17, 101 S.Ct. 960. Application of the revised guidelines law in petitioner's case clearly satisfies this standard.

Miller v. Florida, 482 U.S. at 430. The department then made an argument similar to the one offered by respondents -- that the petitioner was on notice that provisional credits were "contemplated not as a prisoner entitlement but merely as an escape valve which would be triggered only by the need to alleviate overcrowding in the state prison system." (J.A. 45, quoting from *Joseph C. Magnotti v. Harry K. Singletary*, Case No. 93-8554-Civ.- Moreno, USDC-Southern District, decided March 24, 1994.) In rejecting this argument, this Court noted:

> Respondent nevertheless contends that the *ex post facto* concern for retrospective laws is *not* violated here because Florida's sentencing statute "*on its face provides for continuous review and recommendation of changes to the guidelines.*" Brief for Respondent 27-28. Relying on our decision in Dobbert, respondent argues that it is sufficient that petitioner was given 'fair warning' that he would be sentenced pursuant to the guidelines then in effect on his sentencing date. Brief for Respondent 28.
>
> In our view, Dobbert provides scant support for such a pinched construction of the *ex post facto* prohibition.
>
> * * *
>
> The statute in effect at the time petitioner acted did not warn him that Florida prescribed a 5 1/2 to 7 year presumptive sentence for that crime. Petitioner simply was warned of the obvious fact that the sentencing guidelines law -- like any other law -- was subject to revision. The constitutional prohibition

against ex post facto laws cannot be avoided merely by adding to a law that it might be changed.

Miller v. Florida, 482 U.S. at 430-31.

B. The inability to earn provisional credits directly increases petitioner's quantum of punishment. The state's retroactive withdrawal of that ability by virtue of the 1992 revision of §944.277, Fla. Stat. based upon the nature of his offense of conviction, violates the ex post facto clause of the United States Constitution.

Relying upon *California Dept. of Corrections v. Morales*, *supra,* and *Collins v. Youngblood*, 497 U.S. 37, the department contends that, since provisional credits are simply a "procedural" mechanism to control prison population unrelated to any "substantial personal right" of the petitioner, no *ex post facto* violation occurs when those credits are canceled *after the fact*. (J.A. 39-42.)

Morales involved parole consideration, not gain time or provisional credits toward early release. In *Morales*, the State of California did not eliminate the petitioner's eligibility for parole, nor did it change the date of his initial interview for parole suitability. It merely required him to wait 36 months after his initial interview (instead of one year as the statute in effect at the time *Morales* committed his offense of conviction provided) for a subsequent suitability hearing. *Morales*, 514 U. S. at __ ; 181 L Ed. 2nd at 593. Nor did the *Morales* court overturn *Weaver v. Graham*, 450 U.S. 24 (1981) and its progeny; instead it clarified that line of decisions *See Morales*, 514 U.S. at__ ; 181 L Ed. 2nd at 588.[6] In *Morales*, this Court, distinguishing the *Weaver v. Graham*

[6] In footnote 3 of the opinion in *Morales*, however, the Court receded from the language in *Weaver* and other decisions which implied that every retroactive legislative act which might be to the disadvantage of a defendant is necessarily an *ex post facto* violation.

line of cases, held that whether a retrospective legislative act violates the *ex post facto* law constitutional prohibition "must be a matter of degree" (citation omitted), and amendments to laws which create "only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes" do not accomplish that evil. *Morales*, 514 U.S. at ____; 181 L. Ed. 2d at 597. This Court then determined that no *ex post facto* violation occurred based on the fact that *Morales*, a twice convicted murderer serving at least one 15 years to life sentence, had no possible expectation of being paroled within the 36 months waiting period, his parole eligibility was not was not canceled and the rules regarding his ultimate suitability for parole were not altered.

In *Collins v. Youngblood*, 497 U.S. 37 (1990), the jury, having convicted Collins of aggravated sexual abuse, imposed a substantial fine even though no authorization to do so was provided for by law. A later Texas statute authorized the appellate court to reform an improper jury verdict which is what the Texas appeals court proceeded to do. Collins claimed that the Texas verdict reform statute was an *ex post facto* law. *Id.* at 39,40. Finding, in part, that the Texas verdict reform statute was procedural and did not "make more burdensome the punishment for a crime," Collins' habeas petition was denied. *Id.* at 52.

The *Collins* Court warned, however, that "by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause" and acknowledged that "(s)ubtle ex post facto violations are no more permissible than overt ones. *Id.* at 46 (citations omitted). Thus, the question is whether the retroactive law is substantive in that it actually "increase(s) the punishment" or stated slightly differently, "make(s) more burdensome the punishment for a crime." *Id.* at 41, 52.

The 1992 revision of § 944.277(1), Fla. Stat., may be labeled a procedural management tool by the department, but its actual effect upon petitioner was to increase his punishment by causing him to be returned to prison. (J.A. 51.) In addition, it makes more burdensome the punishment for his original crimes by causing him to have to remain confined until May 19, 1998. (J.A. 52) Thus, the subject statute is a violation of the *ex post facto* clause of the United States Constitution.

CONCLUSION

For the reasons set out above, Amicus Curiae, the NACDL, urges this Court to grant the relief sought by petitioner, hold that §944.277, Fla. Stat. (1992), as applied to petitioner and other similarly situated Florida prisoners, violates the *ex post facto* clause of the United States Constitution, issue its writ of habeas corpus, order that petitioner be released from the custody of respondents and grant him such other and further relief as is deemed necessary and appropriate.

Respectfully Submitted,

Lisa B. Kemler*
317 South Patrick Street
Alexandria, Virginia 22314
(703) 684-7900

Baya Harrison, III
Silver Lake Road
Post Office Box 656
Monticello, Florida 32345
(904) 997-8469

* Counsel of Record for *Amicus Curiae,*
National Association of Criminal Defense Lawyers

July 12, 1996

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BRIEF FOR THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CHET KAUFMAN
Assistant Public Defender
301 South Monroe Street
Suite 401
Tallahassee, Florida 32301
(904) 488-2458
Counsel of Record
on behalf of
Florida Public Defender
Association, Inc.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

This brief is submitted by the Florida Public Defender Association, Inc., as *amicus curiae* in support of petitioner Kenneth Lynce. Counsel for petitioner Lynce, Joel T. Remland, and counsel for respondent Mathis, Susan A. Maher, have consented in writing to the Association's appearance as an *amicus* in support of petitioner's cause. Their letters of consent have been filed with the clerk.

The Florida Public Defender Association, Inc., is a nonprofit organization composed of the twenty (20)

elected Public Defenders representing each of the State's judicial circuits, their eight hundred (800) Assistant Public Defenders, and their support staffs. The Association focuses on matters relating to the administration of criminal justice in Florida, as well as matters relating to the needs and interests of public defenders in particular. The Association commonly participates as an *amicus curiae* in judicial proceedings where interests of Association members are at issue.

Thousands of former and current clients of Association members are incarcerated in the custody of the Department of Corrections of the State of Florida. Those clients are subject to the statutes of the State of Florida and regulations of the Department, including its practice of awarding, denying, and canceling provisional credits, gain time, and other such measures, all of which directly affect the length of time an inmate must serve in prison.

Many present and former clients have contacted, and continue to contact, members of this Association to determine their rights and remedies with respect to the award, denial, and cancellation of provisional credits and other such awards that make up a part of the sentencing scheme in Florida. Some clients have asked members of this Association to represent them in judicial proceedings to set aside their pleas or to seek other relief as appropriate when credits have been denied or canceled. It is not uncommon for members of this Association to be appointed by the courts of the State of Florida to represent indigent inmates who have made colorable collateral claims with respect to the legality of state sentencing and incarceration practices, and who require legal services at evidentiary hearings or in appellate proceedings, just as the Federal Public Defender was appointed to represent petitioner Lynce in the case at bar.

The State of Florida has engaged in the practice of retroactive cancellation of sentencing credits in the past, and it continues to do so today. This Association has an

abiding interest in clarifying the constitutional authority of the State of Florida to engage in such questionable practices.

STATEMENT

One of the duties of every criminal defense lawyer in Florida is to advise clients about all the sentencing mechanisms that may affect them. This is an absolutely necessary and common practice, and it plays an active role in every client's decision-making process as to what plea to enter and whether, and to what extent, the client should bargain for a sentence. Provisional credits in particular have played a role in that daily practice. An allegation that a client relied on counsel's inappropriate advice about provisional credits eligibility provides a colorable claim of ineffective assistance of counsel under Florida law. *Eady v. State*, 622 So. 2d 61 (Fla. 1st DCA 1993); *see also Eady v. State*, 604 So. 2d 559 (Fla. 1st DCA 1992). Additionally, because a judge is not permitted to depart downward from the sentencing guidelines due to prison overcrowding considerations, *State v. Moore*, 630 So. 2d 1235 (Fla. 2d DCA 1994), a lawyer must take provisional credits and other overcrowding-related statutory mechanisms into account in the plea bargaining process.

Accordingly, the award of provisional credits has played a significant role in the conduct of criminal justice in the courts of the State of Florida. The petitioner's cause should be viewed in light of these practical considerations.

SUMMARY OF ARGUMENT

The ex post facto clause prohibits arbitrary state action and requires states to provide fair warning that the laws have changed, entitling all persons to the right to rely on the law until the Legislature explicitly changes the law. Likewise, this Court's jurisprudence has merged these ex post facto clause principles with the identical principles of due process to prevent another branch of state govern-

ment from unforeseeably and retroactively enlarging penal law.

In the present case, the executive branch of the State of Florida, with the blessings of Florida's judicial branch, unforeseeably and arbitrarily enlarged a prospective provisional credits statute by applying it retroactively, resulting in the rearrest and reconfinement of petitioner Lynce for five more years after he had been released. The executive branch made that decision even though no explicit law change had been made by the Legislature and even though its interpretation flies in the face of the language of the law, the legislative history, and settled principles of general law. This is the epitome of arbitrariness and unfair warning prohibited by the United States Constitution.

ARGUMENT

THE STATE OF FLORIDA MUST NOT BE PERMITTED TO ARBITRARILY INTERPRET AND APPLY A PROSPECTIVE PROVISIONAL CREDITS STATUTE BY CLAIMING IT WAS AMENDED BY SILENCE TO BECOME RETROACTIVE, THEREBY AUTHORIZING THE STATE TO REARREST PETITIONER AFTER HE HAD BEEN LAWFULLY RELEASED FROM CUSTODY AND TO KEEP HIM IN PRISON FOR FIVE MORE YEARS.

The question in this case boils down to whether the State of Florida is permitted to expand its interpretation of a provisional credits statute that was prospective and had not changed by claiming it had changed to become retroactive, thereby authorizing the State to rearrest and impose additional incarceration on the petitioner whom the State already had released. The answer may well rest in the merger of "arbitrariness" and "fair warning" protections long held to be both part of ex post facto clause jurisprudence and core values fundamental to the liberty interest protected by due process.

A. The Ex Post Facto Clause Protects Citizens From Arbitrary And Unpredictable Exercises Of State Legislative Power.

History demonstrates that a core value of the ex post facto clause, U.S. Const. art. I, § 10, cl. 1, is to protect citizens against arbitrary state actions. As Alexander Hamilton observed in discussing the ex post facto clause, "arbitrary imprisonments[] have been, in all ages, [one of] the favorite and most formidable instruments of tyranny." *The Federalist Papers* No. 84, p. 512 (New American Library ed. 1961). Accordingly, this Court has held that the ex post facto clause ban was intended to "'secure against arbitrary and oppressive legislative action.'" *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30, 46 (1990) (quoting *Malloy v. South Carolina*, 237 U.S. 180, 183, 35 S. Ct. 507, 59 L. Ed. 905 (1915)); *Beazell v. Ohio*, 269 U.S. 167, 171, 46 S. Ct. 68, 70 L. Ed. 716 (1925); *see also California Dep't of Corrections v. Morales*, 115 S. Ct. 1597, 131 L. Ed. 2d 588, 598 (1995) (constitutionality of California law reducing frequency of parole eligibility hearings affirmed partly because procedure was not arbitrary); *Calder v. Bull*, 3 Dall. 386, 388, 1 L. Ed. 648 (1798) (Chase, J.) (the ban protects against "apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law").

Joined with that core value, history shows, is the requirement that a State must give fair warning to its citizens as to whether and how the State is authorized to act punitively against the individual. In this vein, James Madison said the ex post facto clause was a necessary part of the "constitutional bulwark in favor of personal security and private rights" because

> [t]he sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases af-

> fecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community.

The Federalist Papers No. 44, p. 282 (New American Library ed. 1961). In *Calder v. Bull*, Justice Paterson quoted Blackstone in describing how the government's duty to enable citizens to "foresee" government's punitive action is a necessary part of the constitutional protection. *Calder v. Bull*, 3 Dall. at 396 (Paterson, J.) (citing 1 Blackstone Commentaries 46). Thus, for example, in *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977), the Court found no ex post facto violation in Florida's alteration of its capital sentencing scheme after Dobbert's trial because the penal statutes provided fair warning of the quantum of punishment he faced, and that aspect of the sentencing scheme had not changed.

B. Ex Post Facto Protections Merge With Identical Due Process Protections To Prevent Other Arbitrary And Unpredictable Exercises Of State Power.

The Court has recognized that the ex post facto clause protections against arbitrary and unpredictable state acts are so fundamental to our concept of ordered liberty that they must be applied to restrain retroactive government action even when ex post facto legislation is not directly at issue. Accordingly, this Court expressly relied on its ex post facto clause jurisprudence to hold that when government unforeseeably expands the law by judicial interpretation and then uses that new interpretation to deprive an accused of liberty, the government violates fundamental rights protected by the due process clauses of the fourteenth amendment, *Bouie v. Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964); *Douglas v. Buder*, 412 U.S. 430, 93 S. Ct. 2199, 37 L. Ed. 2d 52 (1973), and the fifth amendment, *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

Bouie v. Columbia virtually merged the ex post facto and due process clauses to guard against arbitrary and unpredictable state action. The State of South Carolina prosecuted for criminal trespass two individuals who participated in a "sit in" demonstration, utilizing the theory that they violated the law by remaining in a commercial premises after being told to leave. The criminal trespass statute defined the crime as the "entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry." *Id.* at 349 n.1. In affirming the convictions, a state court construed the statute expansively to include the act of remaining on the premises after receiving notice to leave. This Court threw out the convictions, relying on fair warning and arbitrariness principles underlying the ex post facto clause to inform its due process clause decision.

The Court noted that broadly applying what appears to be a facially clear and narrow statute "lulls the potential defendant into a false sense of security" because he has "no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction." *Id.* at 352. Under these circumstances, ex post facto principles are directly implicated:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

Bouie, 378 U.S. at 353-54 (footnote omitted).

Applying this reasoning to the facts, the Court surveyed South Carolina law and determined that the statute was clear and narrow on its face, the statute had not changed, and judicial interpretation of the statute had

not given it the breadth claimed by South Carolina until after the conduct in that case had occurred. The Court reversed the convictions because the demonstrators had no "fair warning" that their conduct was unlawful.

In *Marks v. United States,* 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977), this Court underscored "fair warning" as one of the underpinnings of the constitution's ex post facto clause, and further entrenched it as a fundamental concept of liberty:

> [T]he principle on which this [Ex Post Facto] Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty.

430 U.S. at 191. Thus it is embraced within the Fifth Amendment's due process clause. *Id. Marks* applied that rationale to reverse convictions on obscenity-related charges because the trial judge erroneously had instructed the jury under the new and expansive standards of *Miller v. California,* 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), rather than the more narrow standard formulated by *Memoirs v. Massachusetts,* 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966), which had been the law when the offenses occurred.

This Court similarly reversed a Missouri court's probation revocation order in *Douglas v. Buder,* 412 U.S. 430, 93 S. Ct. 2199, 37 L. Ed. 2d 52 (1973). Douglas had been on probation, a condition of which required that he report all "arrests" "without delay." 412 U.S. at 431. He was involved in a multi-car traffic accident, was cited for speeding, and reported that citation to his probation officer eleven days later. A Missouri state court found his report to be tardy in violation of that condition of his probation and sentenced him to prison. A state appellate court affirmed. This Court, however, concluded in part that the state court's decision unconstitutionally expanded the interpretation of "arrest" under Missouri law retro-

actively to include a "traffic citation" within its reach when prior state law did not support such a broad definition. 412 U.S. at 432.

Just as this Court used ex post facto clause jurisprudence to inform its due process clause decisions, so too should the Court use its due process clause jurisprudence to inform the decision in this case. The executive branch of the State of Florida, aided by the judicial branch, unforeseeably applied a statute in a retroactive manner even though that statute, historically and facially, was prospective only and the Legislature gave no fair warning that it had changed. The fair warning and arbitrariness protections these clauses provide are identical and overlap to limit state action infringing on liberty in the context of the peculiar circumstances presented here. *Cf. Landgraf v. USI Film Products,* 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229, 252 (1994) (demonstrating the unity of purpose of the ex post facto and due process clauses as reflected in general legal policy against retroactivity).

C. Florida's Executive Branch Arbitrarily Decided To Change Florida Law After Petitioner Had Won His Freedom.

The best way to see how these merged principles apply is to examine the way the Florida law changed, beginning with the adoption of the provisional credits statute. When the Legislature created provisional credits in 1988, as amended prior to 1992, the Legislature said nothing whatsoever to even suggest that provisional credits, once lawfully awarded, might be subject to retroactive cancellation. *See* chs. 89-100, §§ 4, 6, 89-526, § 5, Laws of Fla. (codified at § 944.277, Fla. Stat. (1989)); chs. 90-337, § 14, 90-186, §§ 1, 4, Laws of Fla. (codified at § 944.277, Fla. Stat. (Supp. 1990)); ch. 91-280, §§ 14, 17, Laws of Fla. (codified at § 944.277, Fla. Stat. (1991)). Certainly the text of these enactments provide no fair warning within

the meaning of the ex post facto clause to indicate the Legislature's intent to make these credits subject to retroactive cancellation, even if the State constitutionally could provide and enforce such notice.

Likewise, the 1992 amendment at issue, which became effective July 6, 1992, Ch. 92-310, § 37, Laws of Fla., says not one word about authorizing the State to retroactively cancel lawfully awarded provisional credits. Instead, the legislation is wholly silent as to the matter, so the text again gives no fair warning that retroactive cancellation would be permissible under state law, even if the Legislature constitutionally could do so. *See* ch. 92-310, § 12, Laws of Fla. (codified at § 944.277, Fla. Stat. (Supp. 1992)).

A thorough examination of the legislative history of chapter 92-310 also shows that no retroactive effect had been intended. Not one of the three lengthy staff analyses conducted by the House Committee on Corrections mentions a word about retroactively canceling provisional credits in the 1992 amendment. Instead, the 1992 amendment to section 944.277 had three exclusive and distinct purposes:

> To clarify the intent of the Legislature, a person who has ever been convicted as an habitual offender *at any time*, and any person who is convicted, or has *ever* been convicted, of committing or attempting to commit kidnapping, burglary, or murder, and the offense was committed with the intent to commit sexual battery or a sex act was attempted or completed during commission of the offense, shall not be eligible for provisional credits.
>
> In addition, the department is authorized to rely on any document leading to or generated during the course of the criminal proceedings, including, but not limited to, any presentence investigation or any information contained in arrest reports relating to circumstances of the offense when making provisional credit eligibility determinations.

Fla. H.R. Comm. on Corrections, CS/2d ENG/HB 197-H, 19-H, 131-H, Staff Analysis 23 (July 8, 1992) (emphasis in original); Fla. H.R. Comm. on Corrections, CS/HB 197-H, 19-H, 131-H, Staff Analysis 22 (June 3, 1992); Fla. H.R. Comm. on Corrections, HB 197-H, Staff Analysis 25 (May 29, 1992) [maintained in Series 19, Carton 2382, Florida State Archives, Tallahassee, Florida]. Moreover, had the Legislature intended to cancel provisional credits for thousands of prisoners, *see* footnote 3, *infra,* certainly the fiscal impact would have been great. Yet neither the Department of Corrections nor the Legislature saw such a fiscal impact in the 1992 amendment:

> The department [of Corrections] reports that, by denying provisional credits and control release to the inmates covered by the bill, it is expected that the time served in prison will be increased for a relatively small number of inmates; however, since provisional release and control release are emergency release mechanisms, there is no way to determine when and how many inmates would be affected.

July 8 Staff Analysis at 33; June 3 Staff Analysis at 32; May 29 Staff Analysis at 35.

Contrast these facts with what the Legislature expressly put in the law. The statutory exclusion making provisional credits unavailable to prisoners convicted of murder or attempted murder affected only those who committed their crimes on or after January 1, 1990. *See* ch. 89-100, § 6, Laws of Fla. (the act creating the murder/attempt exclusion in section 944.277(1)(i) "shall take effect January 1, 1990, and shall apply to offenses committed on or after the effective date").

The Florida judiciary recognized the prospective nature of that statute and recognized a constitutional distinction created by the way in which the Legislature implemented section 944.277(1)(i). Two months *before* petitioner Lynce's release, a Florida appellate court held that a

prisoner incarcerated for a murder committed prior to the January 1, 1990, effective date of section 944.277(1)(i), could not be denied provisional credits retroactively. *Dominguez v. State*, 17 Fla. L. Weekly D1853 (Fla. 1st DCA July 29, 1992), *revised on rehearing on other grounds*, 606 So. 2d 757 (Fla. 1st DCA 1992). The Court held that the Florida Supreme Court's prior decisions permitting retroactive denial of provisional credits under *other, preexisting* portions of section 944.277, *Dugger v. Rodrick*, 584 So. 2d 2 (Fla. 1991), *cert. denied*, 502 U.S. 1037, 112 S. Ct. 886, 116 L. Ed. 2d 790 (1992), and *Felk v. Dugger*, 589 So. 2d 905 (Fla. 1991), *cert. denied*, 504 U.S. 918, 112 S. Ct. 1961, 118 L. Ed. 2d 562 (1992), were not controlling because the 1989 amendment that added section 944.277(1)(i), was prospective. Moreover, the Attorney General of Florida acknowledged that Florida law prior to the 1992 amendment did not provide for retroactive cancellation of lawfully awarded provisional credits. Op. Att'y Gen. Fla. 92-96 (Dec. 29, 1992) (Appended to Petitioner's Brief).

Thus, the only "fair warning" provided by Florida law at the time of petitioner Lynce's release was that petitioner Lynce and others similarly situated could not, retroactively, be denied the benefit of lawfully awarded provisional credits. This was apparent on the face of the statute and from its history, and was made even more clear by the Florida judiciary in *Dominguez*. The Department of Corrections recognized this to be the case and recognized *Dominguez* as authoritative at the time of petitioner Lynce's release. *See* letter of Department of Corrections Secretary Harry K. Singletary to Attorney General Robert A. Butterworth, (Dec. 30, 1992) (Appended to Petitioner's Brief).

Two months after *Dominguez* was decided, the Department of Corrections complied with *Dominguez* by awarding Petitioner Lynce the 1,860 days of provisional credits that he had been awarded under section 944.277(1)(i)

since they became available in 1988, and by releasing him pursuant to those credits on October 1, 1992. *See* Joint Appendix 50. Under these circumstances, the State cannot make a legitimate claim that it made a "mistake" when it discharged the petitioner, when in fact it was following controlling law at the time.

The first time the State of Florida indicated it had changed its view of Florida law came about on December 29, 1992, 89 days after petitioner Lynce's release from custody. On that day, the Attorney General issued a written opinion to resolve a hot political issue raised by two elected officials who were concerned about the impending release of a single prisoner, Donald Glenn McDougall, into their central Florida community. The Attorney General opined that McDougall could be kept behind bars. To accomplish that, he inferred from the absence of a date of application in the 1992 recodification of section 944.277(1)(i), that the 1992 amendment changed the law and opened the door to permit retroactive cancellation of provisional credits. To reach that opinion, the Attorney General distinguished *Dominguez* and tried to limit it to its facts. Op. Att'y Gen. Fla. 92-96 (Dec. 29, 1992); *see also* letter of Attorney General Robert A. Butterworth to Department of Corrections Secretary Harry K. Singletary, Dec. 31, 1992) (Appended to Petitioner's Brief).[1]

The Florida Attorney General's Opinion was not controlling or binding authority under Florida law, *e.g. State v. Family Bank of Hallandale*, 623 So. 2d 474, 478 (Fla. 1993), and the Supreme Court did not cite it when, in an

[1] Arguably, the Attorney General's Opinion could have been read to violate bill of attainder and due process clause principles as applied to McDougall. *See Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1951) (reversing dismissal of complaints by three organizations charging that the Attorney General had unconstitutionally included them on lists of subversive organizations); Lawrence Tribe, *American Constitutional Law*, 660 (2d ed. 1988).

original proceeding decided in a one-paragraph unreported opinion on April 29, 1993, it denied habeas corpus relief to an inmate whose provisional credits had been canceled. *Ipnar v. Singletary*, 620 So. 2d 761 (Fla. 1993) (table).[2]

Interestingly, the *Ipnar* decision also had no controlling authority under Florida law. *Department of Legal Affairs v. District Court of Appeal*, 434 So. 2d 310, 312 (Fla. 1983) (repudiating the precedential value of unpublished decisions issued with or without opinions). *Accord* 11th Cir. R. 36-2 (unpublished opinions have no controlling authority). Nonetheless, the State seized upon the unpublished opinion as judicial authorization to rearrest petitioner Lynce: Four days later, on May 3, 1993, it issued an Affidavit for Retaking Prisoner (Lynce), and got a court order fourteen (14) days thereafter to rearrest Lynce. *See* Joint Appendix 51.[3]

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[2] The text of the *Ipnar* opinion, maintained in the public records of the Supreme Court of Florida, said in full:

> Petitioner's scheduled release from prison due to provisional credits was canceled by the Department of Corrections. Under these circumstances, Petitioner is not entitled to relief. *See Dugger v. Rodrick*, 584 So. 2d 2 (Fla. 1991). Accordingly, the Petition for Writ of Habeas Corpus is denied.
>
> It is so ordered.

[3] Petitioner Lynce was not alone. The Department issued warrants/orders to reincarcerate 164 inmates whom it had released. The Department caused 135 freed persons to be returned to custody. For 18 others, the warrants were ineffective because their sentences had fully expired while out of custody. Three died before their warrants could be served. Eight warrants were still outstanding as of July 9, 1996, including four for individuals deported or held for deportation and four for individuals whose whereabouts are unknown. In all, the Department retroactively canceled provisional credits for 2,789 individuals pursuant to its new-found interpretation of the 1992 amendment.

The same scenario arose in 1993 when the Legislature rescinded the provisional credits statute altogether, along with administrative gain time. Ch. 93-406, § 32, Laws of Fla. (codified at § 944.278, Fla. Stat. (1993)). Pursuant to that act, the Department retroactively canceled provisional credits for 4,155 persons. Letter of Department of Corrections to Chet Kaufman, July 9, 1996. A copy is printed in the appendix to this brief.

The Supreme Court of Florida finally published an opinion on the subject more than a year later, on May 19, 1994, denying habeas corpus relief in *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994), a case similar in many respects to the case at bar. The Court held that section 944.277(1)(i), as amended in 1992, constitutionally had been applied retroactively to cancel provisional credits awarded during Griffin's incarceration, which commenced in 1986, the same year he committed his crime.

D. The Retroactive Application Of A Law That Had Not Changed Was Arbitrary And Unpredictable, In Violation Of Ex Post Facto/Due Process Principles.

Two compelling conclusions can be reached from these facts, and both support petitioner's cause. First, the executive branch's decision had no valid basis in Florida law. The statutory authority it invoked when it canceled petitioner Lynce's credits did not provide for retroactive cancellation of provisional credits, contrary to the opinion of the Attorney General. This Court recently invoked the principles of ex post facto clause and due process clause jurisprudence to say,

> As Justice Scalia has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.

Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229, 252 (1994). That presumption generally applies in the absence of a clear, contrary statement of intent by the Legislature. *See, e.g., id.*, 128 L. Ed. 2d at 254. Here, however, no clear statement indicating a contrary legislative intent can be found. At worst, the 1992 amendment was facially uncertain as to whether it authorized retroactive cancellation, and its un-

certainty was not revealed until three months after petitioner Lynce's release. Under these facts, the retroactive destruction of petitioner Lynce's liberty epitomizes the kind of unpredictable and arbitrary state action condemned by principles underlying the ex post facto clause. *Cf. California Dep't of Corrections v. Morales*, 115 S. Ct. 1597, 131 L. Ed. 2d 588, 598 (1995) (system reducing parole eligibility hearings was clear, the procedure was "carefully tailored" not to allow arbitrary determinations, and the prisoner in that case certainly had not been denied a hearing arbitrarily).

The second compelling conclusion is that the State of Florida is in much the same position as the wrongful government actors in *Bouie v. Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964), *Douglas v. Buder*, 412 U.S. 430, 93 S. Ct. 2199, 37 L. Ed. 2d 52 (1973), and *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). Because the statute had not changed in the 1992 amendment, as demonstrated above, Florida law did not really change until long after petitioner Lynce had won his freedom on October 1, 1992. The Attorney General first stirred the pot with his opinion on December 29, 1992; the Florida Supreme Court decided *Ipnar v. Singletary* on April 29, 1993; and the Florida Supreme Court officially proclaimed the law changed by publishing *Griffin v. Singletary* on May 19, 1994. That retroactive expansion of Florida law certainly could not be foreseen from the Legislature's silence in its July 1992 recodification of section 944.277. The State of Florida's decision to terminate petitioner Lynce's liberty under these circumstances flies in the face of this Court's ex post facto clause/due process clause jurisprudence.

The State of Florida should not be permitted to do what this Court prohibited in other cases. The United States Constitution is just a shadow of what the Framers intended if it is read to allow the State to reincarcerate

an individual for five years after lawfully releasing him on the same charge. Denying relief in this case would violate rights "fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. at 191.

CONCLUSION

For the reasons stated above and in petitioner Lynce's brief on the merits, this Court should grant the relief petitioner seeks and reverse the judgment under review.

Respectfully submitted,

CHET KAUFMAN
Assistant Public Defender
301 South Monroe Street
Suite 401
Tallahassee, Florida 32301
(904) 488-2458
Counsel of Record
on behalf of
Florida Public Defender
Association, Inc.

APPENDIX

APPENDIX

Letter of Department of Corrections to Chet Kaufman, dated July 9, 1996

[Logo]

FLORIDA
DEPARTMENT OF
CORRECTIONS

An Affirmative Action/Equal Opportunity Employer

Governor
LAWTON CHILES

Secretary
HARRY K. SINGLETARY, JR.

2601 Blair Stone Road
Tallahassee, FL 32399-2500

July 9, 1996

Chet Kaufman
Assistant Public Defender
Office of the Public Defender
Leon County Courthouse, Suite 401
Tallahassee, Florida 32301

Re: Kenneth Lynce v. Hamilton Mathis
No. 95-7452, United States Supreme Court

Dear Mr. Kaufman:

As you requested, I am supplying the following information relative to the number of offenders affected by the 1992 amendments to section 944.277 effective July 6,

1992, which required retroactive cancellation of overcrowding (provisional) credits for two groups of offenders formerly eligible for early release because of prison overcrowding and the number of offenders affected by the 1993 legislation creating section 944.278 which required the retroactive cancellation of overcrowding credits (both administrative gaintime under former section 944.276 and provisional credits under former section 944.277) for all offenders in custody on the effective date of June 17, 1993.

As I explained to you this week, when the 1992 amendments became effective on July 6, 1992, the department did not recognize that the amendments to section 944.277 and the reenactment of sections 944.277(1)(h) and 944.277(1)(i) required retroactive cancellation of all provisional credits for the two groups enumerated in subsections (1)(h) and (1)(i). Accordingly, the department did not perform the retroactive cancellation on July 6, 1992, for these groups of offenders and a couple hundred offenders were erroneously released between the effective date of July 6, 1992, and the issuance of the opinion of the Attorney General 92-96 in December 1992 in which the Attorney General pointed out the retroactive nature of the two subsections. The department immediately stopped further releases of these groups and subsequently cancelled provisional credits for 2,789 offenders in those two offense categories who were still in custody. Warrants were issued or court orders were entered to return to custody the offenders in those two offense categories who were erroneously released after July 6, 1992. The sentences of these offenders continued to run while erroneously released. A total of 164 warrants/orders were issued. Of those, 135 offenders were returned to custody, 18 offenders completed their sentences while out of custody, 3 offenders died, and 8 warrants are outstanding (3 of the outstanding warrants are for offenders being held for deportation, 1 offender was deported, and the locations of 4 offenders are unknown).

Section 944.278 which became effective the following year on June 17, 1993, required the cancellation of both administrative gaintime and provisional credits. On the effective date of the law, 4,155 offenders were in custody that were affected by the cancellation. Figures for subsequent cancellations for offenders returned to custody since June 17, 1993, for revocation of post-release supervision for which overcrowding credits were cancelled are not available.

I hope this answers the questions that you posed to me earlier this week.

Sincerely,

/s/ Susan A. Maher
SUSAN A. MAHER
Deputy General Counsel